No. 01-1067-CFX Title: United States, Petitioner
v.
White Mountain Apache Tribe

Docketed: January 22, 2002 Court: United States Court of Appeals for the Federal Circuit

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Nov 9 2001 | Application (01A388) to extend the time to file a petition for a writ of certiorari from November 20, 2001 to December 20, 2001, submitted to The Chief Justice. |
| | Nov 14 2001 | Application (01A388) granted by the Chief Justice extending the time to file until December 20, 2001. |
| | Dec 10 2001 | Application (01A388) to extend further the time to file a petition for a writ of certiorari from December 20, 2001 to January 19, 2002, submitted to The Chief Justice. |
| | Dec 11 2001 | Application (01A388) granted by the Chief Justice extending the time to file until January 19, 2002. |
| | Jan 22 2002 | Petition for writ of certiorari filed. (Response due March 22, 2002) |
| | Feb 1 2002 | Order extending time to file response to petition until March 22, 2002. |
| | Mar 22 2002 | Brief of respondent White Mountain Apache Tribe in opposition filed. |
| | Mar 26 2002 | LODGING consisting of ten bound copies of related material submitted by counsel for the respondent. |
| | Apr 3 2002 | DISTRIBUTED for Conference of April 19, 2002 |
| | Apr 5 2002 | Reply brief of petitioner United States filed. |
| | Apr 22 2002 | Petition GRANTED.<br>SET FOR ARGUMENT December 2, 2002.<br>********** |
| | May 30 2002 | Order extending time for filing the joint appendix and petitioner's brief on the merits to and including July 8, 2002. |
| | Jul 5 2002 | Order extending time to file respondent's brief on the merits to and including September 9, 2002. |
| | Jul 5 2002 | Brief of petitioner United States filed. |
| | Jul 8 2002 | Motion of the Solicitor General to dispense with printing the joint appendix filed. |
| | Aug 26 2002 | Motion of the Solicitor General to dispense with printing the joint appendix GRANTED. |
| | Aug 26 2002 | Order further extending the time to file respondent's brief on the merits to and including September 18, 2002. |
| | Sep 18 2002 | Brief of respondent White Mountain Apache Tribe filed. |
| | Sep 18 2002 | Brief amicus curiae of National Congress of American Indians filed. |
| | Sep 20 2002 | LODGING consisting of tweny bound copies of related material submitted by counsel for respondent |
| | Oct 24 2002 | Reply brief of petitioner United States filed. |
| | Nov 7 2002 | CIRCULATED. |
| | Nov 29 2002 | Record filed. |
| | Dec 2 2002 | ARGUED. |

Supreme Court, U.S.
FILED

011067 JAN 22 2002

OFFICE OF THE CLERK

No.

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

WHITE MOUNTAIN APACHE TRIBE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In 1960, Congress declared that a former military post in Arizona would "be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8. The question presented is whether that Act authorizes the award of money damages against the United States for alleged breach of trust in connection with such property.

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# In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

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WHITE MOUNTAIN APACHE TRIBE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-36a) is reported at 249 F.3d 1364. The opinion of the Court of Federal Claims (App., *infra*, 37a-56a) is reported at 46 Fed. Cl. 20.

### JURISDICTION

The judgment of the court of appeals was entered on May 16, 2001. A petition for rehearing was denied on August 22, 2001 (App., *infra*, 58a). On November 14, 2001, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 20, 2001. On December 11, 2001, the Chief

Justice further extended the time within which to file a petition for a writ of certiorari to and including January 19, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATUTORY PROVISIONS INVOLVED**

1. The Act of March 18, 1960, Pub. L. No. 86-392, 74 Stat. 8, states:

> [A]ll right, title, and interest of the United States in and to the lands, together with the improvements thereon, included in the former Fort Apache Military Reservation * * *, and subsequently set aside by [25 U.S.C. 277], as a site for the Theodore Roosevelt School, located within the boundaries of the Fort Apache Indian Reservation, Arizona, are hereby declared to be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose.

2. Other pertinent statutory provisions—the Tucker Act, 28 U.S.C. 1491(a), Indian Tucker Act, 28 U.S.C. 1505, and 25 U.S.C. 277—are set forth in the appendix. App., *infra*, 59a-60a.

**STATEMENT**

This case concerns the threshold standard that governs in determining whether the United States is subject to suit for money damages for an alleged breach of fiduciary duty in connection with property that it holds in trust for an Indian Tribe.

1. The property at issue in this case is a former military post, Fort Apache, located within the boundaries of the Fort Apache Indian Reservation in east



central Arizona, just south of Whiteriver along Highway 73.[1] Fort Apache was established by the United States Army in 1870 and, together with the surrounding 7579 acres, was set aside by President Grant in 1877 as a military reserve. In Arizona's territorial times, Fort Apache provided a strategic outpost from which federal soldiers—aided by White Mountain Apache scouts—engaged Apache bands, including the one led by Geronimo. The Army operated the fort until 1922, when an Executive Order placed it "under the control of the Secretary of the Interior" (Secretary) for use in accordance with federal law governing the disposal of abandoned military property (Act of July 5, 1884, ch. 214, 23 Stat. 103), or as otherwise provided by Congress. See S. Rep. No. 671, *supra*, at 3; App., *infra*, 2a.

In 1923, Congress authorized the Secretary to use Fort Apache to establish the Theodore Roosevelt Indian School, provided "[t]hat the Fort Apache military post, and land appurtenant thereto, shall remain in the possession and custody of the Secretary of the Interior so long as they shall be required for Indian school purposes." 25 U.S.C. 277. In the Act of March 18, 1960, Congress "declared" that Fort Apache would "be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and

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[1] The reservation was initially established by an Executive Order in 1871. In 1897, Congress set aside a smaller portion of that reservation for exclusive use by the White Mountain Apache Tribe (Tribe). Act of June 7, 1897, ch. 3, 30 Stat. 64; see S. Rep. No. 671, 86th Cong., 1st Sess. 2-3 (1959). The Tribe is organized under Section 16 of the Indian Reorganization Act, 25 U.S.C. 476. It operates several commercial ventures, including the Hon-Dah Resort Casino, Sunrise Park Ski Resort, and various other outdoor recreational activities. See <<http://www.wmat.nsn.us>>.

improvements for administrative or school purposes for as long as they are needed for that purpose." 74 Stat. 8.[2] Since 1960, the Secretary has continued to hold Fort Apache in trust, while operating the Theodore Roosevelt Indian School. App., *infra*, 3a.

There are more than 30 buildings and other structures on Fort Apache. They include the officers' quarters, barracks, parade grounds, and stables and barns used by the cavalry that first occupied the fort; school facilities such as class rooms, dormitories, and a cafeteria; and administrative buildings such as storage and septic facilities. See App., *infra*, 3a; App. A to Compl. (listing buildings). Numerous buildings are more than a half a century old, and several date back to the fort's frontier days. Over time in the White Mountain environment, some buildings have fallen into varying states of disrepair, and a few structures have been condemned or demolished. See App., *infra*, 3a.

In 1976, portions of Fort Apache, including the Theodore Roosevelt School, were designated as a national historic site known as the Fort Apache Historic District. App., *infra*, 39a. In 1993, the Tribe

[2] In 1960, about 410 acres of Fort Apache were used for school purposes. On the approximately 7169 acres that remained, Indians had built homes and other improvements, and had used the land for "tribal grazing." S. Rep. No. 671, *supra*, at 3. In recommending passage of the 1960 Act, the Department of the Interior proposed the "subject to" clause that was subsequently enacted by Congress, explaining that that clause would reserve the right of the United States to continue to use "the property for the specified purposes." *Id.* at 2, 3. The Department further stated that "[t]his reserved right applies to any part of the land and improvements, and not merely to the lands and improvements that are presently in use. This will provide flexibility and permit modifications to be made in present administrative use without seeking new legislation." *Id.* at 4.



adopted a master plan for repairing and restoring property within the historic district. It then commissioned a 1999 survey, which concluded that re-landscaping the historic district and refurbishing its buildings and improvements in accordance with various environmental and historic preservation laws and building code provisions would cost approximately $14 million. *Id.* at 3a-4a. In addition, the Tribe has asserted that Fort Apache "has become an increasingly significant tourist attraction," and that it "has constructed a cultural museum within its boundaries." Tribe C.A. Reply Br. 3.

2. In 1999, the Tribe filed a "Complaint for Money Damages" against the United States in the Court of Federal Claims, alleging (at para. 1) that the government breached "fiduciary obligations" to the Tribe in the course of the government's "use, occupation, control, supervision, management and administration" of Fort Apache property "for administrative and school purposes." In particular, the Tribe alleged (*ibid.*) that the government "breach[ed] its fiduciary duty to maintain, protect, repair and preserve the Tribe's trust corpus." According to the complaint (at paras. 32-33), the government's asserted fiduciary duty stems from the 1960 Act, as well as from other land-use statutes and regulations.[3] The complaint (at 13) seeks $14 million in damages to repair and refurbish Fort Apache property, as well as an unspecified amount of "[c]ompensation for the economic loss and value of annual lease/rental fees."

3. The United States moved to dismiss the Tribe's complaint, arguing, *inter alia*, that under the principles

[3] The additional statutes relied upon by the Tribe include the Snyder Act, 25 U.S.C. 13; National Historic Preservation Act, 16 U.S.C. 470; Historic Sites, Buildings and Antiquities Act, 16 U.S.C. 462; and Non-Intercourse Act, 25 U.S.C. 177.

established by this Court's decisions in *United States* v. *Mitchell* (*Mitchell I*), 445 U.S. 535 (1980), and *United States* v. *Mitchell* (*Mitchell II*), 463 U.S. 206 (1983), the United States is not subject to a suit for money damages with respect to the trust property at issue, because neither the 1960 Act nor any of the other statutes or regulations relied upon by the Tribe establishes an obligation on the part of the United States with respect to such property that could give rise to a claim for money damages. The Court of Federal Claims granted the government's motion, and dismissed the complaint for failure to state a claim. App., *infra*, 37a-56a.

After reviewing the *Mitchell* decisions and lower court precedent applying them, the Court of Federal Claims stated that the dispositive inquiry in this case is whether, under the statutes or regulations identified by the Tribe, the United States owes the Tribe "any specific responsibilities with respect to the Fort Apache buildings and improvements that give rise to a money claim for breach of trust." App., *infra*, 46a. The court answered that question in the negative. The court viewed "the 1960 Act as similar to the provisions of the General Allotment Act which [were] found insufficient to establish a money-mandating claim in *Mitchell I*." *Id.* at 47a. The court further reasoned that, unlike the statutes in *Mitchell II*, "the 1960 Act does not direct the government to manage the Fort Apache site for the benefit of the Tribe." *Id.* at 48a. Instead, "[a]s the plain language indicates, the Act reserves the Fort Apache site for the federal government's benefit and not for the benefit of the Tribe." *Ibid.*

The Court of Federal Claims rejected the Tribe's argument "that, even if the statutes and regulations do not expressly create a [money-mandating] fiduciary relationship, [the United States'] day-to-day occupation, use, control, or supervision of Fort Apache under the 1960 Act" establishes such a relationship. App., *infra*, 50a. The court explained that the Tribe's argument "misconstrues * * * *Mitchell II* by focusing on the extent, rather than the nature of control necessary to establish a fiduciary relationship." *Ibid.* In that regard, the court emphasized that, although the 1960 Act "may give the government complete control over the Fort Apache site, [the Act does not] require that the government manage the Fort Apache site for the purpose of protecting the Tribe's financial interests. Indeed, the 1960 Act allows the government to manage and operate the land and buildings for its own benefit for as long as it needs them." *Id.* at 52a.

The Court of Federal Claims also rejected the Tribe's argument that it was entitled to relief under the common law doctrine of permissive waste. App., *infra*, 55a. The court explained that the Tribe failed to show that "an action for permissive waste establishes a money-mandating claim, as required under the Supreme Court's opinion in *Mitchell II*." *Ibid.* In any event, even under the common law, the court concluded, "an action for permissive waste, even if proper, does not ordinarily give rise to a money claim." *Id.* at 53a. Rather, "the appropriate remedy for permissive waste is generally an injunction," which the Tribe did not request in its self-styled "Complaint for Money Damages." *Id.* at 54a.[4]

[4] The United States also argued that the Tribe's claim was barred by the six-year statute of limitations established by 28 U.S.C. 2501. Because of its conclusion that the Tribe had failed to state a claim, the court did not reach that "alternative basis for dismissal." App., *infra*, 56a.

4. The court of appeals reversed and remanded. App., *infra*, 1a-32a. The court agreed with the Court of Federal Claims that none of the general land-use statutes or regulations relied upon by the Tribe establishes a money-mandating obligation on the part of the United States, see *id.* at 8a-10a, but it reached the opposite conclusion with respect to the 1960 Act. The court acknowledged that the 1960 Act does not "direct[] the United States to manage the trust corpus for the benefit of the beneficiaries, *i.e.*, the Native Americans," and that "the 1960 Act does not explicitly define the government's obligations" with respect to the property. *Id.* at 14a, 19a. The court nevertheless "infer[red] that the government's use of any part of the property requires the government to act in accordance with the duties of a common law trustee." *Id.* at 18a.

The court of appeals looked to "the common law of trusts, particularly as reflected in the *Restatement (Second) of Trusts*," to define the government's obligations. App., *infra*, 19a. Under the common law, the court concluded, a private trustee in the government's position "has an affirmative duty to act reasonably to preserve the trust property." *Id* at 20a. The court further determined that, under the permissive waste doctrine, the failure to perform that duty would give rise to a claim for money damages. *Id.* at 28a. In reaching that conclusion, the court found that the Tribe's interest in the property was better characterized "as an indefeasibly vested future interest" than as a "contingent future interest" (for which, the court found, damages would not be available under common law). *Id.* at 27a-28a.

The court of appeals remanded for a parcel-by-parcel determination of what trust property is in fact "under United States control," which under the court's analysis, triggers money-mandating fiduciary duties on the government's part. App., *infra*, 31a; see *id.* at 18a. In doing so, the court noted that the "record in this case is unclear as to the extent of the government's control and use of the many buildings and grounds comprising Fort Apache." *Ibid.*



Chief Judge Mayer dissented. App., *infra*, 33a-36a. In his view, under the *Mitchell* framework the key question is whether "the statutes or regulations give the government full responsibility for managing Indian resources and land for the benefit of the Indians." *Id.* at 33a. He reasoned that—just like the statute in *Mitchell I*—the 1960 Act fails to meet that test. In particular, he noted that "[n]othing in the 1960 Act imposes a fiduciary responsibility to manage the fort for the benefit of the Tribe and, in fact, it specifically carves the government's right to unrestricted use for the specified purposes out of the trust." *Id.* at 33a-34a. Thus, Chief Judge Mayer concluded that the United States "has no fiduciary obligation to maintain the land and improvements for the Tribe that could lead to money damages," and would have affirmed the dismissal of the Tribe's complaint on that basis. *Id.* at 34a.

Chief Judge Mayer saw no need to delve into the common law to decide the threshold immunity issue. Nonetheless, he disagreed with the court's common law analysis, and would have affirmed on that "independent ground" as well. App., *infra*, 36a. He explained that under common law, "the owner of a contingent future interest has no right to sue for money damages for permissive waste," and that the Tribe held only such a contingent future interest, because its interest was subject to the "condition precedent * * * that the government no longer needs to use the property for school or administrative purposes." *Id.* at 34a, 35a.

## REASONS FOR GRANTING THE PETITION

The sovereign immunity of the United States from claims for money damages is a matter of bedrock importance. The divided court of appeals' decision in this case directly contravenes this Court's precedents with respect to the statutory predicate necessary to find that the United States has agreed to subject itself to money damages for an alleged breach of trust.

The court of appeals held that the United States is accountable in money damages for an alleged breach of trust in connection with the property placed in trust by the 1960 Act, even though the court acknowledged (App., *infra*, 14a) that the 1960 Act does not obligate the United States to manage the property for the benefit of the Tribe and, in fact, the Act explicitly reserves *to the government* the right to use the property for government purposes "for as long as" (74 Stat. 8) it deems necessary. That ruling directly conflicts with this Court's *Mitchell* decisions, as well as with time-honored immunity principles. The Tribe itself recognized in the Court of Federal Claims "that to hold the government liable for money damages where the government has the right to use the trust property for its own purposes calls for an extension of *Mitchell II*." App., *infra*, 52a. Given the "substantial importance" of issues concerning "the liability of the United States" for an alleged breach of trust, *Mitchell II*, 463 U.S. at 211, certiorari is warranted to consider whether such an "extension" is proper.

Furthermore, the court of appeals' decision directs the focus of the threshold determination whether the United States may be liable to an Indian Tribe for money damages for breach of trust away from the terms of the pertinent *statute* enacted by Congress to a



case-by-case inquiry into the existence of *control* by government officials over the particular parcels of property at issue. Whenever sufficient control is evident, the decision equates the money-mandating obligations of the United States with those of a private trustee as defined by the *Restatement of Trusts*. On several different levels, that analysis is neither warranted, nor wise. In particular, that approach subjects the important immunity determination to an indeterminate fact-bound inquiry, and it contravenes the long-standing rule established by this Court's decisions that an enforceable claim to money damages must stem directly from a statute, implementing regulation, or other substantive right established by positive law.

The broad reasoning of the court of appeals could subject the United States to large money-damages claims in Indian breach-of-trust litigation, without any evidence whatsoever that Congress intended to expose the treasury of the United States to such liability. Indeed, the decision in this case already has been relied upon by the Court of Federal Claims to expose the United States to significant potential liability for alleged breach of trust in other pending Indian litigation.

### A. This Case Concerns A Threshold Immunity Question Of Fundamental Importance To The United States

"It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Mitchell I*, 445 U.S. at 538 (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)); see *Mitchell II*, 463 U.S. at 212. In determining whether the United States has granted such consent, this Court has repeatedly stated that "[a] waiver of sovereign

immunity 'cannot be implied but must be unequivocally expressed.'" *Mitchell I*, 445 U.S. at 538 (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)); accord, *e.g.*, *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999); *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). That settled rule of construction applies with equal force with respect to "Indian plaintiffs." *United States* v. *Mottaz*, 476 U.S. 834, 851 (1986).

Congress has consented to be sued on certain claims for money damages under the Tucker Act and the Indian Tucker Act. 28 U.S.C. 1491(a) and 1505. But as this Court has recognized, those statutes are merely jurisdictional. See *Mitchell II*, 463 U.S. at 212-217; see also App., *infra*, 7a-8a, 41a. They do "not create any substantive right enforceable against the United States for money damages." *Mitchell II*, 463 U.S. at 216; see *United States* v. *Testan*, 424 U.S. 392, 398 (1976). As a result, in order to state a claim for money damages against the United States that is cognizable under the Tucker Acts, a plaintiff must point to a "substantive right" stemming from some other provision of law —such as a statute or implementing regulation—that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Mitchell II*, 463 U.S. at 217. The requisite waiver of sovereign immunity exists only "[i]f a claim falls within this category." *Id.* at 218; see also *Office of Personnel Mgmt.* v. *Richmond*, 496 U.S. 414, 431 (1990).

This Court's *Mitchell* decisions rest on that foundation. In the underlying *Mitchell* litigation, the Quinault Tribe and numerous individual Indians sought damages from the United States for alleged breach of fiduciary duties with respect to timberlands on the Quinault Indian Reservation that had been allotted in trust to



individual Indians. In *Mitchell I*, the Court held that the General Allotment Act—which provides for the United States to hold allotted lands "in trust for the sole use and benefit of [Indian allotees]," 445 U.S. at 541 (quoting 25 U.S.C. 348)—did not support a money-damages action against the United States for alleged mismanagement of timber resources on allotted lands. As the Court explained, the General Allotment Act created "only a limited trust relationship between the United States and the [Tribe]." *Id.* at 542. "The Act does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." *Ibid.*

In *Mitchell II*, the Court considered a different set of statutes and implementing regulations and held that they could "fairly be interpreted as mandating compensation by the Federal Government" for mismanagement of such resources. 463 U.S. at 228. In so holding, the Court emphasized that those provisions established "'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber." *Id.* at 222; see *id.* at 221 (regulations "required the preservation of Indian forest lands in a perpetually productive state"). Distinguishing the situation in *Mitchell I*, the Court stated: "In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land *for the benefit of the Indians*." *Id.* at 224 (emphasis added); see *id.* at 226.[5]

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[5] Justice Powell, joined by then-Justice Rehnquist and Justice O'Connor, dissented in *Mitchell II*. 463 U.S. at 228-238. In their view, even the type of comprehensive statutory and regulatory scheme involved in that case—requiring the government to

Together, the *Mitchell* decisions establish important limitations on the potential liability of the United States for breach of trust with respect to property held in trust for an Indian Tribe or individual Indians.

### B. The Court Of Appeals' Decision Conflicts With This Court's Precedents

The court of appeals' decision in this case directly conflicts with the *Mitchell* decisions, and fundamentally misapplies the basic principles of sovereign immunity on which those decisions rest.

1. The 1960 Act does not expressly "create any substantive right enforceable against the United States for money damages," and nothing in that Act "can fairly be interpreted as mandating compensation by the Federal Government" to the Tribe based on the government's exercise of its reserved right to use the property. *Mitchell II*, 463 U.S. at 216, 217. The Act does not give "the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians." *Id.* at 224. To the contrary, as the court of appeals acknowledged, "[i]t is undisputed that the 1960 Act contains no * * * requirement" that the United States "manage the trust corpus for the benefit of the beneficiaries, *i.e.*, the Native Americans." App., *infra*, 14a. And as the court of appeals further acknowledged, "neither the 1960 Act nor any pertinent regulation sets

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manage trust property for the benefit of the Indians—failed to confer "the necessary legislative authorization of a damages remedy" against the United States, because "[n]one of [those provisions] contains any 'provision . . . that expressly makes the United States liable' for its alleged mismanagement of Indian forest resources and their proceeds or grants a right of action 'with specificity.'" *Id.* at 230 (quoting *Testan*, 424 U.S. at 399, 400).



forth clear guidelines" as to how the government is to manage the property at all. *Id.* at 18a.

At most, the 1960 Act establishes only the type of "limited trust relationship" that did not give rise to a money-mandating obligation in *Mitchell I*. 445 U.S. at 542. The Act simply "declare[s]" that "all right, title, and interest of the United States in and to [Fort Apache]" are "held by the United States in trust for the [Tribe]." 74 Stat. 8. In fact, however, the 1960 Act is an even *less* likely source of a money-mandating obligation than the statute considered by the Court in *Mitchell I*. The General Allotment Act explicitly obligates the United States to hold allotted lands "in trust for the *sole* use and benefit of the Indian [allottees]." 445 U.S. at 541 (quoting 25 U.S.C. 348) (emphasis added). The 1960 Act not only does not require the government to hold the trust property for the "sole use and benefit" of the Indian beneficiaries; it specifically reserves to the United States the right to use the property for government purposes "for as long as" it deems such use necessary. 74 Stat. 8.

As Chief Judge Mayer explained in his dissent:

> Nothing in the 1960 Act imposes a fiduciary responsibility to manage the fort for the benefit of the Tribe and, in fact, it specifically carves the government's right to unrestricted use for the specified purposes out of the trust. Although the school is for the benefit of the Tribe, the 1960 Act expressly permits, but does not require, the government to use the fort as an Indian school. The use of the phrase "for as long as they are needed," far from expressing a fiduciary obligation, vests discretion in the Secretary of the Interior to determine how long to operate the Indian school.

App., *infra*, 34a; see also *id.* at 52a ("[T]he 1960 Act allows the government to manage and operate the land and buildings for its own benefit for as long as it needs them.") (Court of Federal Claims' decision).

Under the teaching of the *Mitchell* decisions, the provision allowing the Secretary to use the property for *government* purposes should alone have foreclosed the conclusion that the 1960 Act creates a money-mandating obligation on the part of the United States *to the Tribe*. Indeed, as noted above, the Tribe itself has acknowledged "that to hold the government liable for money damages where the government has the right to use the trust property for its own purposes calls for an extension of *Mitchell II*." App., *infra*, 52a. In addition, of course, such a holding requires an evisceration of *Mitchell I*.

2. The court of appeals believed that "control alone is sufficient to create a fiduciary relationship" that is enforceable against the United States in an action for money damages. App., *infra*, 15a. That understanding also is contradicted by the *Mitchell* decisions, especially the second one. In finding that the statutes and regulations at issue in *Mitchell II* established a money-mandating obligation on the part of the United States, the Court did point to the fact that the government had assumed "elaborate control over forests and property belonging to Indians," *i.e.*, the trust property. 463 U.S. at 225. But the Court did not state, much less hold, that such control "alone" (App., *infra*, 15a) gave rise to the money-mandating obligation. To the contrary, the Court pointed to such control only after finding that "the statutes and regulations [at issue] clearly give the Federal Government full responsibility to manage Indian resources and land *for the benefit of the Indians*." *Id.* at 224 (emphasis added).



In other words, as the Court of Federal Claims explained, the *Mitchell* inquiry is directed to "the *nature* of control"—*i.e.*, control stemming from statutes or implementing regulations that clearly obligate the United States to manage the trust property for the benefit of the Tribe—and not simply the "extent" of control *vel non*. App., *infra*, 50a (emphasis added). That understanding conforms to the Court's general immunity jurisprudence. Confining the analysis to whether the United States exercises "control" over trust property would contravene the well-established principle that to recover monetary relief from the United States, a plaintiff must identify a statute, regulation, or other source in positive law of a substantive right that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Mitchell II*, 463 U.S. at 217 (quoting *Testan*, 424 U.S. at 400).

3. The court of appeals compounded its error by holding that, since "the 1960 Act does not explicitly define the government's obligations" with respect to the trust property at issue, it was proper "to *infer* that the government's use of any part of the property requires the government to act in accordance with the duties of a common law trustee" and, further, to *infer* that such use subjects the government to the money-mandating obligations of a common law trustee. App., *infra*, 18a (emphasis added); see *id.* at 19a (because the 1960 Act "does not explicitly define the government's obligations," we "look to the common law" to define those obligations); *id.* at 31a (under common law, "the Tribe's claim gives rise to a cognizable claim for money damages"). That analysis essentially turns the settled rule on its head. The rule established by this Court's precedents is that there is *no* substantive right against

the United States for money damages unless the statute "in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Testan*, 424 U.S. at 402. Under the decision below, by contrast, the government's money-mandating obligations "must be determined by the general law of trusts *as modified by the 1960 Act.*" App., *infra*, 26a (emphasis added); see *id.* at 24a.

The court of appeals believed that its approach was supported by several decisions in Indian cases in which this Court has looked to the common law of trusts. See App., *infra*, 19a (citing *Seminole Nation* v. *United States*, 316 U.S. 286, 296 (1942); *United States* v. *Mason*, 412 U.S. 391, 398 (1973); *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 121 S. Ct. 1060, 1068 (2001)). In those cases, however, the Court considered the common law in evaluating the scope of the United States' duties in circumstances in which it was understood that the United States had assumed trust duties under a provision of positive law with respect to the particular matter at issue, and not—as the court of appeals did here—to impose a money-mandating obligation on the part of the United States that had no grounding in a statute, implementing regulation, or treaty.[6] It is one thing to say that the United States,

[6] The money claims in *Seminole Nation* were predicated on alleged violations of express promises by the United States in treaties or statutes to pay sums certain to the Tribe. 316 U.S. at 293-294. In *Mason*, the Court found no breach of any fiduciary obligation on the part of the United States, and thus had no occasion to consider the circumstances in which the United States may be held to have waived its immunity from suit for money damages for breach of trust. 412 U.S. at 400. And *Klamath Water Users* did not even involve a claim for money damages for breach of trust, but instead a claim for *documents* under the Freedom of Information Act. See 121 S. Ct. at 1064. Cf. *United States* v. *Creek Nation*, 295 U.S. 103, 109 (1935) (money claims involving alleged misappropriation of property that the United States gave to Tribe by treaty in "fee simple").



when acting as trustee for an Indian Tribe, may assume certain duties that are analogous to those recognized at common law between private trustee and beneficiaries. See *Nevada* v. *United States*, 463 U.S. 110, 127 (1983). It is quite another to say that simply by entering a generalized trust relationship with an Indian Tribe, or by passing a statute providing that certain property will be held in trust, Congress has created a cause of action against the United States for money damages for all obligations that would apply to a private trustee.

The *Mitchell* decisions prove the point. In *Mitchell I*, this Court rejected the argument that the plaintiffs were entitled to money damages to compensate for the alleged breach of trust simply "because that remedy is available in the ordinary situation in which a trustee has violated a fiduciary duty and because without money damages [plaintiffs] would have no effective redress for breaches of trust." 445 U.S. at 541-542. In *Mitchell II*, the Court stated that "the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust." 463 U.S. at 226.[7] But the Court explicitly

[7] For support, the Court referred in a footnote to its decisions in *Seminole Nation* and *Creek Nation* (as well as certain lower court decisions). See 463 U.S. at 226 n.31. The Tribe's claim for money damages in each of those cases, however, was specifically based on the violation of a *substantive right* granted by the United States in a treaty or statute, and not on violation of mere common law duties. See note 6, *supra*.

grounded its finding of a money-mandating obligation for breach of the particular trust duties spelled out in the statutes and implementing regulations relied upon by the Tribe. See *id.* at 228 ("We thus conclude that the statutes and regulations at issue here can fairly be interpreted as mandating compensation by the Federal Government for violations of its fiduciary responsibilities in the management of Indian property."); see *id.* at 226.[8]

The United States occupies a unique relationship with the Indian Tribes that has long been characterized as one of "guardianship" or "trust." See *United States* v. *Kagama*, 118 U.S. 375, 382-384 (1886); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). The United States fully accepts the implications of that relationship and the undertakings that go with it. Not all those undertakings, however—such as the operation of a school for Indian children—give rise to legally enforceable *duties* on the part of the United States, much less duties that are enforceable in a suit for money damages. In determining when an alleged breach of those duties may give rise to a suit for money damages, this Court has invoked the same principles that govern the determination whether the United States is immune from money-damages actions in other contexts. See *Mitchell II*, 463 U.S. at 218-219; *Mitchell I*, 445 U.S. at 538; see also *Mottaz*, 476 U.S. at 851; *Klamath & Moadoc Tribes of Indians* v. *United States*,

[8] In a similar vein, this Court in *Nordic Village*, 503 U.S. at 39, refused to "[r]esort to the principles of trust law" to find that the United States had waived its immunity from a bankruptcy trustee's claims for money damages, and specifically indicated that "trust decisions" involving private entities "are irrelevant" when it comes to determining the liability of the *government*.



296 U.S. 244, 250, 255 (1935); *Blackfeather* v. *United States*, 190 U.S. 368, 376 (1903). To the extent that the court of appeals' decision puts the United States in the shoes of a private, common law trustee for purposes of determining whether it has assumed money-mandating obligations to an Indian Tribe, that decision departs significantly from this Court's precedents.

4. The decision below conflicts with this Court's sovereign immunity jurisprudence in another crucial respect. This Court has recognized the need for clear and predictable rules in the area of sovereign immunity. See *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991) ("In traditionally sensitive areas, * * * the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."). The analysis adopted by the court of appeals below could scarcely be more at odds with that objective. Under the court's decision, the potential liability of the United States for millions of dollars in damages for alleged breach of trust ultimately turns *not* on the terms of the pertinent statutes or regulations, but instead on whether the Tribe's interest in the Fort Apache property is better characterized as a "contingent future interest" or an "indefeasibly vested future interest," an arcane issue on which the panel itself split. App., *infra*, 27a-28a; see *id.* at 35a-36a (dissent).[9]

[9] Chief Judge Mayer correctly resolved this issue. See App., *infra*, 34a-36a. But to be clear, in deciding whether the United States is immune from the Tribe's money-damages claims, there should be no need for this Court to plumb that issue because—consistent with the *Mitchell* decisions and other precedents discussed above—the key issue is whether the statutes or regulations on which the Tribe's claims are based "can fairly be interpreted as

Furthermore, under the court's "control" rule, the United States faces (common law) money-mandating obligations "only as to the specific parcels of trust property that the federal government has used and controlled" and—the court cryptically added—"possibly the grounds immediately surrounding such parcels." App., *infra*, 18a. As a result, the determination whether (or to what extent) the government is liable for breach of trust hinges on a fact-intensive, parcel-by-parcel inquiry into "the extent that the federal government has * * * used buildings to the exclusion of the Tribe." *Ibid.* That is a highly amorphous inquiry on which to base the liability of a sovereign for money damages. More to the point, there is no evidence on the face of the 1960 Act (or any other statute or regulation cited by the Tribe) that Congress intended to expose the United States to mandatory liability in that haphazard manner. The proper approach—and the one that this Court's own precedents establish—grounds the determination whether the United States is immune from money damages on the terms of the statutes or regulations on which the damages claim is based.[10]

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mandating compensation by the Federal Government for damages sustained." *Mitchell II*, 463 U.S. at 226.

[10] Because damages actions against the United States are confined by the Tucker Act and Indian Tucker Act to the Court of Federal Claims, the basic sovereign immunity issue presented is unlikely to arise in other circuits. The court of appeals' decision in this case represents a significant doctrinal development in the Federal Circuit's own decisions in this important area. In prior cases, the Federal Circuit has recognized that, in order to give rise to a claim for money damages, a money-mandating duty must "spring[] from the statutes and regulations which 'define the contours of the United States' fiduciary responsibilities.'" *Pawnee* v. *United States*, 830 F.2d 187, 192 (Fed. Cir. 1987), cert. denied, 486 U.S. 1032 (1988); see *id.* at 190 (grounding money-mandating obligation in "statutes and regulations [that] (a) give elaborate powers to Interior with respect to [oil and gas] leases, (b) always call for consideration of the best interests of the Indians, (c) require proceeds of the leases to be given to the Indians and, (d) recognize the existence of a general trust relationship toward the Indians with respect to the oil and gas products of these lands"); see also *Brown* v. *United States*, 86 F.3d 1554, 1562 (Fed. Cir. 1996) (grounding money-mandating duty in statutes and regulations that "make it clear beyond any doubt that the Secretary exercises his or her control over commercial leasing on allotted lands not only for traditional general welfare purposes * * * but also for the purpose of protecting [Indian] allottees' financial interests"). Chief Judge Mayer dissented in *Brown*, and argued that the statutes and regulations relied upon by the court in that case were insufficient —compared against those in *Mitchell II*—to give rise to a money-mandating obligation on the part of the United States. See *id.* at 1564-1565. In this case, the court of appeals essentially divorced the immunity inquiry from the terms of the pertinent statutes and regulations and, instead, tied it to judge-made principles of common law and notions of federal control over trust property.



### C. The Court Of Appeals' Decision Can Be Expected To Have Serious Adverse Consequences For The Government

The potential fiscal and programmatic implications of the court of appeals' decision are significant. The Tribe's damages claim in this case alone totals $14 million, plus unspecified damages for economic loss. The decision below will encourage the filing of additional damages claims against the United States for breach of trust with respect to Indian trust property, or buildings on such property. The United States holds more than 56 million acres of land in trust for individual Indians or Indian Tribes. A significant portion of that land, including allotments, is held in a limited or bare trust. The decision in this case could prompt money-damages claims for breach of trust with respect to such

property, even though such claims would otherwise be barred under a proper understanding of this Court's *Mitchell* decisions.

Furthermore, the broad reasoning of the court of appeals' decision in this case already has spilled over into other types of Indian breach-of-trust litigation. For example, in *Navajo Nation* v. *United States*, 263 F.3d 1325 (2001), the Federal Circuit held that the United States is subject to money damages for an alleged breach of trust in approving an Indian mineral lease. In so holding, the court of appeals specifically stated that, in *White Mountain Apache*, "we found an enforceable fiduciary relationship between the White Mountain Apache Tribe and the government whose breach could give rise to a claim for money damages" even though, as the court recognized, the statute here does not impose any fiduciary obligations on the United States to manage the land on behalf of the Tribe. *Id.* at 1335; see *id.* at 1329-1330 ("Although the statute [in *White Mountain Apache*] was silent on how the United States was to administer the property, the court applied the common law of trusts to hold that the United States had a trustee's duty to preserve the trust corpus, despite the absence of a specific statute and regulations."); *id.* at 1335 (In *White Mountain Apache*, "we determined the government's obligations * * * [by] looking to the common law of trusts.").[11]

[11] Judge Schall dissented in part in *Navajo Nation*. He agreed with the court that the statutes and regulations governing Indian mineral leasing gave rise to a "general fiduciary relationship between the [Navajo] Nation and the government regarding coal leases." 263 F.3d at 1339. But he took the position that to state a claim for money damages for breach of such relationship, the Tribe was required to "show the breach of a *specific* fiduciary obligation that falls within the contours of the statutes and regulations that create the general fiduciary relationship." *Id.* at 1341 (emphasis added). The Tribe here could not possibly make such a showing; it is undisputed that "neither the 1960 Act nor any pertinent regulation sets forth clear guidelines as to how the government must manage the trust property." App., *infra*, 18a.



The Court of Federal Claims already has applied the decision in this case as well. See *Shoshone Indian Tribe of the Wind River Reservation* v. *United States*, 51 Fed. Cl. 60, 68 (2001) ("In *White Mountain Apache Tribe*, the Federal Circuit applied the common law of trusts to hold that the United States had a trustee's duty to preserve the trust corpus, *despite absence of specific statutory or regulatory language regarding a fiduciary relationship.*") (emphasis added).

In short, the decision below—which departs sharply from this Court's *Mitchell* decisions—is taking root, and the rapid speed with which it already has spread underscores that the basic question presented is of an important and recurring nature. As the court of appeals recognized in this case, "[t]he Supreme Court has not provided further guidance in this area since the 1983 decision in *Mitchell II*." App., *infra*, 13a. Such guidance is now needed.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2002

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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No. 00-5044

WHITE MOUNTAIN APACHE TRIBE,
PLAINTIFF-APPELLANT

*v.*

UNITED STATES, DEFENDANT-APPELLEE

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Decided: May 16, 2001
Rehearing and Rehearing En Banc
Denied Aug. 22, 2001

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Before: MAYER, Chief Judge, MICHEL and DYK, Circuit Judges.

Opinion for the court filed by Circuit Judge DYK. Dissenting Opinion filed by Chief Judge MAYER.

### DECISION

DYK, Circuit Judge.

This case presents the question of whether a 1960 Act of Congress, Pub. L. No. 86-392, 74 Stat. 8 (1960) (the "1960 Act"), obligates the United States to maintain or restore certain property and buildings held by the United States in trust for the White Mountain

Apache Tribe (the "Tribe")[1] so that the Tribe can maintain a suit for damages in the Court of Federal Claims. We hold that it does, though the obligation created is narrower than that claimed by the Tribe. We accordingly reverse and remand the decision of the Court of Federal Claims in *White Mountain Apache Tribe v. United States*, 46 Fed. Cl. 20 (1999), for further proceedings consistent with this opinion.

## FACTUAL BACKGROUND

In 1870, the United States Army established a military post known as "Fort Apache" on approximately 7,500 acres of land within the borders of what later became the White Mountain Apache Tribe's reservation in Arizona.[2] The Army operated Fort Apache as a military post until 1922, when Congress transferred control of the Fort to the Secretary of the Interior, and designated approximately 400 acres of the Fort for use as a boarding school for Native American children to fulfill certain unspecified treaty obligations of the United States. See 25 U.S.C. § 277 (1994).[3]

In 1960, Congress passed the 1960 Act which declared the Fort to be "held by the United States in

[1] The Tribe is a federally recognized Native American tribe organized under section 16 of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 476.

[2] The Tribe's reservation was established by an Act of Congress on June 7, 1897. 30 Stat. 62, 64 (1897).

[3] That statute provided that "[t]he Secretary of the Interior is authorized to establish and maintain the former Fort Apache military post as an Indian boarding school for the purpose of carrying out treaty obligations, to be known as the Theodore Roosevelt Indian School: Provided, That the Fort Apache military post, and land appurtenant thereto, shall remain in the possession and custody of the Secretary of the Interior so long as they shall be required for Indian school purposes." 25 U.S.C. § 277.



trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." Pub. L. No. 86-392, 74 Stat. 8 (1960). Pursuant to that statute, the government allegedly controls and has the ability to use approximately thirty-five buildings on the site. The Court of Federal Claims found, and the parties do not dispute, that a small number of students are currently enrolled in the school, and that "the future of the school as a viable institution is apparently under review." *White Mountain Apache Tribe*, 46 Fed. Cl. at 22 n.2. According to the parties, the government has offered to terminate its trusteeship over an unspecified number of the buildings and to transfer control of them to the Tribe. The Tribe, however, has refused to accept that offer unless and until the government rehabilitates the buildings. The record does not reveal whether the United States has turned over any of the buildings to the Tribe.

At issue in this appeal is the government's obligation as trustee to maintain and restore those buildings, which include, *inter alia*, barracks constructed by the United States Army, the Native American boarding school and student dormitories, and various administrative buildings constructed by the Department of the Interior.

According to the Tribe, the government has had exclusive access to and control over those buildings and has allowed many of them to fall into disrepair. The Tribe alleges, and the government does not dispute, that the Department of the Interior has condemned and demolished several buildings deemed to be unsafe. The Tribe contends that it has repeatedly requested, to no

avail, that the Secretary of the Interior and the Bureau of Indian Affairs maintain and restore the trust property. In May of 1993, the Tribe adopted a "master plan"[4] for the preservation and restoration of the Fort. In November of 1998, the Tribe commissioned an assessment of the trust property and obtained cost estimates for the repair and preservation of the buildings. According to that report, as of 1999, the total cost to rehabilitate the buildings amounted to approximately $14 million dollars. The government responds that it has indeed maintained and restored some of the thirty-five buildings, but acknowledges that others are dilapidated.[5]

On March 19, 1999, the Tribe commenced a breach of trust action in the Court of Federal Claims seeking $14 million dollars in damages for the government's alleged breach of "its fiduciary duty to maintain, protect, repair and preserve the Tribe's trust corpus." The Tribe alleged that its claim arose under the 1960 Act, as well as the Snyder Act (codified at 25 U.S.C. § 13), the National Historic Preservation Act of 1966 (codified at 16 U.S.C. § 470 *et seq.*) and a variety of other federal statutes and regulations.

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[4] The Tribe does not define the phrase "master plan." The Tribe's complaint merely provides, in pertinent part, that in 1993, "the Tribe declared its intent to intervene and save its imperiled trust property and adopted a Master Plan to protect, preserve, maintain, repair, rehabilitate and restore said property within the Historic District as a cultural and economic resource for the Tribe."

[5] We note that in 1976, the National Park Service designated the Fort as a National Historic Site, and that in September 1997, the World Monuments Watch placed the Fort on the "1998 List of 100 Most Endangered Monuments." *White Mountain Apache Tribe*, 46 Fed. Cl. at 22.



The government filed a motion to dismiss for failure to state a claim upon which relief may be granted and for lack of subject matter jurisdiction. In that motion, the government argued that neither the 1960 Act, nor any of the other statutes and regulations cited by the Tribe, imposed an obligation on the United States to maintain or restore the buildings held in trust for the Tribe, and that the Tribe had not stated a cognizable claim for money damages for the government's alleged mismanagement of that trust property. In addition, the government contended that the Tribe's breach of trust claim, even if otherwise valid, accrued outside the six-year statute of limitations period governing claims brought against the United States under 28 U.S.C. §§ 1491 and 1505.

The Court of Federal Claims agreed with the government that the Tribe had failed to prove the existence of a fiduciary obligation on the part of the United States that would, if breached, give rise to a claim for money damages, and dismissed the complaint for failure to state a claim. In reaching that decision, the court relied on two Supreme Court cases which establish the principles governing breach of trust claims by Native Americans against the United States, *United States v. Mitchell*, 445 U.S. 535, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980) ("*Mitchell I*"), and *United States v. Mitchell*, 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) ("*Mitchell II*").[6] The Court of Federal Claims found that the language of the 1960 Act "creates a limited, or bare trust relationship between the government and the Tribe," akin to the trust relationship created by the General Allotment Act of 1887, 24 Stat.

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[6] The *Mitchell* cases are discussed in detail in part IV of this opinion, *infra*.

388, codified at 25 U.S.C. § 331 *et seq.*, which was found in *Mitchell I* not to impose fiduciary duties on the United States. *White Mountain Apache Tribe*, 46 Fed. Cl. at 26. The court further noted that unlike the statutes and regulations found to create fiduciary duties in *Mitchell II*, the 1960 Act "does not direct the government to manage the Fort Apache site for the benefit of the Tribe." *Id.* at 26.

The court also rejected the Tribe's argument that, even if the government had no fiduciary obligation to maintain the property for the benefit of the Tribe, the government was liable for its failure to prevent deterioration of the property under a "permissive waste" theory, by analogy to property law. (Under this theory, as articulated by the Tribe, the United States, as the current tenant of the trust property, would be required to take reasonable steps to prevent deterioration of the property in anticipation of its transfer to the Tribe.) The court disagreed, noting that "the difficulty with plaintiff's argument is that an action for permissive waste, even if proper, does not ordinarily give rise to a money claim." *Id.* at 28. Referencing a secondary source that summarized sections 188, 189 and 195 of the *Restatement (First) of Property* (1936), the court observed that "[t]he law on 'permissive waste' provides that the appropriate remedy for permissive waste is generally an injunction," an equitable remedy that the Court of Federal Claims lacks jurisdiction to award. *Id.* *But cf. Bobula v. United States Dep't of Justice*, 970 F.2d 854, 858 (Fed. Cir. 1992) (noting that equitable relief is sometimes available in a suit brought under the Tucker Act, 28 U.S.C. § 1491, when that relief "is incidental to and collateral to a claim for money damages"). In short, the court concluded that it lacked



jurisdiction over the Tribe's claim and accordingly dismissed the action for failure to state a claim upon which relief may be granted. The court did not reach the government's statute of limitations argument. This timely appeal followed.

## DISCUSSION

### I

The question before us is whether the Court of Federal Claims erred in dismissing this breach of trust claim against the United States for failure to state a claim upon which relief may be granted. We review that decision without deference. *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1286-87 (Fed. Cir. 1999). We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(3) (1994).

### II

The Tucker Act gives the Court of Federal Claims jurisdiction over broad categories of claims against the United States and constitutes a waiver of sovereign immunity as to those claims. 28 U.S.C. § 1491 (1994); *Mitchell II*, 463 U.S. at 212, 103 S.Ct. 2961. A companion statute, the Indian Tucker Act, further confers jurisdiction on the Court of Federal Claims to hear any claim brought by a Native American tribe against the United States that "is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe." 28 U.S.C. § 1505. Although the Tribe premised jurisdiction in the Court of Federal Claims upon both statutes, it is § 1505 that primarily confers jurisdiction over this action.

However, it is axiomatic that these two statutes are merely jurisdictional and do not create "any substantive right enforceable against the United States for

money damages." *Mitchell II*, 463 U.S. at 216, 103 S. Ct. 2961 (discussing the Tucker Act); *Mitchell I*, 445 U.S. at 540, 100 S.Ct. 1349 ("It follows that 28 U.S.C. § 1505 no more confers a substantive right against the United States to recover money damages than does 28 U.S.C. § 1491."). Thus, in order to state a claim, the Tribe must point to some other source of law, such as "the Constitution, or any Act of Congress or any regulation of an executive department" that imposes an obligation on the United States to repair and preserve the Tribe's trust property. 28 U.S.C. § 1491(a)(1). The Tribe must also demonstrate that the source of law relied upon "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *Mitchell II*, 463 U.S. at 217, 103 S. Ct. 2961 (quoting *United States v. Testan*, 424 U.S. 392, 400, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976)).

## III

Before the Court of Federal Claims and on this appeal, the Tribe argued that a variety of statutes and regulations, other than the 1960 Act, impose fiduciary obligations upon the United States. We disagree.

The Snyder Act governs the general appropriations of the Bureau of Indian Affairs ("BIA"). It provides, in pertinent part, that the BIA "shall direct, supervise, and expend such monies as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes: . . . For industrial assistance and advancement *and general administration of Indian property*. . . . For the enlargement, extension, improvement, *and repair of the buildings and grounds of existing plants and projects*." 25 U.S.C. § 13 (emphases added). We agree with the Court of Federal Claims



that this statute fails "to provide a basis for a money-mandating claim as laid out in *Mitchell II*." *White Mountain Apache Tribe*, 46 Fed. Cl. at 26. Indeed, in *Lincoln v. Vigil*, 508 U.S. 182, 194, 113 S. Ct. 2024, 124 L. Ed. 2d 101 (1993), the Supreme Court held that the "general terms" of the Snyder Act do not require expenditure of general appropriations on specific programs for particular classes of Native Americans. *See also Vigil v. Andrus*, 667 F.2d 931, 934 (10th Cir. 1982) (holding that language of the Act is "too broad to support a conclusion that Congress has expressly appropriated funds for lunches for all Indian school children").

While other statutes or regulations relied on by the Tribe may impose obligations on federal agencies, none of these statutes or regulations imposes fiduciary obligations that would lead to a claim for money damages. *See* the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470 *et seq.* (requiring federal agencies to manage and maintain historic properties under their control); the Historic Sites, Buildings, Objects, and Antiquities Act of 1935, 16 U.S.C. § 462(f) (requiring Secretary of the Interior, *inter alia*, to "[r]estore, reconstruct, rehabilitate, preserve and maintain" any historic or prehistoric buildings or property); Title XI of the Education Amendments Act of 1978, 25 U.S.C. § 2005 (requiring the Secretary of the Interior to bring "all schools, dormitories, and other facilities" operated by the Bureau of Indian Affairs "into compliance with all applicable Federal, tribal, or State health and safety standards"); the Improving America's Schools Act of 1994, 25 C.F.R. § 32.4(s)(2) (requiring federal government to "[m]aintain all school and residential facilities to meet appropriate Tribal, State or Federal safety, health and child care standards"); 25 U.S.C.

§ 177 (precluding conveyance of Native American lands without United States' approval); the American Indian Trust Fund Management Act of 1994, 25 U.S.C. § 4043(c)(5)(C)(ii) (requiring Special Trustee for Native Americans to certify that the Department of the Interior's budget requests to Congress are adequate to "discharge, effectively and efficiently, the Secretary's trust responsibilities" to Native Americans). Thus we find that none of these statutes or regulations "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained," *Mitchell II*, 463 U.S. at 216-17, 103 S. Ct. 2961, to the trust property.

Accordingly, we turn our attention to the 1960 Act.

## IV

As noted earlier, the 1960 Act provides, in pertinent part, that certain lands and improvements thereon shall "be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use" the property "for administrative or school purposes." Pub. L. No. 86-392, 74 Stat. 8 (1960).

Both the Tribe and the United States in their briefs agree that the 1960 Act creates a "trust."[7] The statute itself states that the land and "improvements thereon" are held "in trust" for the Tribe. Moreover, it is well-established that a common law trust arises when three elements are present, namely, a trustee, a beneficiary, and a trust corpus. *Restatement (Second) of Trusts* § 2

[7] Inexplicably, at oral argument the government reversed its position by arguing that a beneficial interest in the property had not yet passed to the Tribe. But for the reasons stated in the text, we find that the 1960 Act creates a "trust."



cmt. h (1959); *see also Mitchell II*, 463 U.S. at 225, 103 S. Ct. 2961; *Cheyenne-Arapaho Tribes v. United States*, 966 F.2d 583, 589 (10th Cir. 1992) (listing elements of common-law trust), *cert. denied*, 507 U.S. 1003, 113 S. Ct. 1642, 123 L. Ed. 2d 265 (1993). In this case, all of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Tribe) and a trust corpus (the land and buildings held in trust).

However, the mere fact that the 1960 Act creates a trust relationship does not end the inquiry. We must also determine whether there is a fiduciary obligation created by the 1960 Act or merely a "bare trust." *Mitchell II*, 463 U.S. at 224, 103 S. Ct. 2961. If there is no fiduciary obligation, then there is no claim for money damages for the alleged breach of that obligation.

In *Mitchell I*, the Supreme Court held that federal statutes and regulations that create only a "limited trust relationship" between the United States and Native American tribes do not impose fiduciary obligations that give rise to claims for money damages. 445 U.S. at 542, 100 S. Ct. 1349. The statute at issue in that case, the General Allotment Act of 1887 (codified at 25 U.S.C. § 331 *et seq.*), provided in pertinent part that the United States was to "hold the land thus allotted . . . in trust for the sole use and benefit of the Indian to whom such allotment shall have been made." 445 U.S. at 541, 100 S. Ct. 1349. Relying on that statute, individual Native American allottees sued the United States for alleged breach of its fiduciary duty to properly manage certain timber resources (located on the reservation) for the production of income. One of our predecessor courts, the Court of Claims, denied the United States' motion to dismiss the action, reasoning that the plain language of the statute created a general

fiduciary duty enforceable against the United States by means of a claim for money damages. The Supreme Court disagreed, holding that the language of the statute, when understood in light of the legislative history, "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources." *Id.* at 542, 100 S. Ct. 1349. The Court concluded that "[a]ny right of the respondents [allottees] to recover money damages for Government mismanagement of timber resources must be found in some source other than" the General Allotment Act. *Id.* at 546, 100 S. Ct. 1349. The Court noted that the "Court of Claims did not consider the respondents' [allottees'] assertion that other statutes . . . render the United States liable in money damages for the mismanagement alleged in this case," *id.* at 546 n.7, 100 S. Ct. 1349, and accordingly remanded the case for consideration of these alternative statutory bases for the United States' liability. *Id.* at 546, 100 S. Ct. 1349.

On remand, the Court of Claims found that the statutes relied upon by the allottees other than the General Allotment Act—conferring responsibility on the federal government for timber management on Indian lands, roadbuilding and the granting of right-of-way over those lands, and trust fund management[8] —created a trust relationship sufficient to ground a claim for money damages under the Tucker Act.

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[8] Those statutes involved, inter alia, timber management on Native American lands (25 U.S.C. §§ 406, 407, 466), roadbuilding on and rights-of-way over those lands (25 U.S.C. §§ 318, 323-325), and the administration of funds held in trust for Native American trusts (25 U.S.C. § 162a). *Mitchell v. United States*, 229 Ct. Cl. 1, 664 F.2d 265, 269-274 (Ct. Cl. 1981) (en banc).



*Mitchell v. United States*, 229 Ct. Cl. 1, 664 F.2d 265, 269 (Ct. Cl. 1981) (en banc). The Court of Claims accordingly denied the government's motion to dismiss the action.

In *Mitchell II*, the Supreme Court agreed that the allottees had properly stated a claim against the United States for breach of trust, reasoning that:

> In *[Mitchell I]*, this Court recognized that the General Allotment Act creates a trust relationship between the United States and Indian allottees but concluded that the trust relationship was limited. . . . *In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians.* They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.

*Mitchell II*, 463 U.S. at 224, 103 S. Ct. 1261 (emphasis added). In reaching this conclusion, the Court first noted (with regard to the timber management statutes) that "[v]irtually every stage of the process is under federal control," and that "[t]he Department [of the Interior] exercises comparable control over grants of rights-of-way on Indian lands held in trust." *Id.* at 222-23, 103 S. Ct. 2961. The Court further observed that "[t]he language of these statutory and regulatory provisions directly supports the existence of a fiduciary relationship." *Id.* at 224, 103 S. Ct. 2961.

The Supreme Court has not provided further guidance in this area since the 1983 decision in *Mitchell II*, though a number of lower court decisions, including

decisions of this court, have applied the holdings of the *Mitchell* cases in other statutory contexts. For example, in *Pawnee v. United States*, 830 F.2d 187 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032, 108 S. Ct. 2014, 100 L. Ed. 2d 602 (1988), this court concluded that the Indian Long Term Leasing Act, 25 U.S.C. § 396, and the Federal Oil and Gas Royalty Management Act, 30 U.S.C. §§ 1701-1757, "give elaborate powers to Interior with respect to" oil and gas leases on mineral lands held in trust for the Native Americans. *Id.* at 190. Relying on *Mitchell II*, we accordingly held that those statutes imposed fiduciary obligations on the United States. *Id.*; *see also Brown v. United States*, 86 F.3d 1554, 1563 (Fed. Cir. 1996) (concluding that "the commercial leasing regime created for [Native American] trust lands in 25 U.S.C. § 415(a) and 25 C.F.R. part 162 imposes general fiduciary duties on the government in its dealings with the Indian allottee-lessors"); *Short v. United States*, 50 F.3d 994, 998 (Fed. Cir. 1995) (holding that certain federal statutes providing for the payment of interest on tribal trust funds held by the United States, "in conjunction with the government's fiduciary duty to Native American tribes, give the plaintiffs a substantive right to damages, including interest" for breach of that duty) (citing *Mitchell II*, 463 U.S. at 224-26, 103 S. Ct. 2961).

On this appeal, the government urges that the *Mitchell* cases, read together, impose a fiduciary obligation only when the pertinent statute or other authorizing document creating the trust relationship also directs the United States to manage the trust corpus for the benefit of the beneficiaries, *i.e.*, the Native Americans. It is undisputed that the 1960 Act contains no such requirement, and the government



accordingly argues that the statute cannot serve as a basis for the imposition of fiduciary obligations on the United States. We do not agree.

To be sure, *Mitchell II*, which found a fiduciary obligation, involved a situation where the government not only controlled the trust corpus, but also had an obligation to manage it for the benefit of the Indians. But the language of *Mitchell II* makes quite clear that control alone is sufficient to create a fiduciary relationship. The Supreme Court in that case emphasized that:

> [W]here the Federal Government takes on or has *control or supervision* over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

*Mitchell II*, 463 U.S. at 225, 103 S. Ct. 2961 (quoting *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 624 F.2d 981, 987 (Ct. Cl. 1980)) (emphasis added).

In *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996), we held that control alone was sufficient to establish a fiduciary relationship there. In that case, in 1964, Native American allottees, pursuant to the leasing power extended to them by 25 U.S.C. § 415,[9]

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[9] In 1964, section 415 provided, in pertinent part, that "[a]ny restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential or business purposes . . . and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior." The statute was

collectively leased their land for use as a commercial golf course. In 1990, the Bureau of Indian Affairs, acting under 25 C.F.R. § 162.14,[10] determined that the lessee had breached the lease agreement and that this breach precluded the lessee from exercising an option to renew the lease.

The allottees brought a breach of trust action against the United States in the Court of Federal Claims for money damages arising from the government's refusal to allow the lessee to renew the lease. The court granted a motion to dismiss by the United States for lack of subject matter jurisdiction, concluding that section 415 and the corresponding regulations "cannot be fairly interpreted to mandate the payment of compensation for breaches thereof." *Brown*, 86 F.3d at 1557. In reaching that conclusion, the trial court noted that the government's "control over the Indian lands authorized by the applicable legal provisions is not sufficiently elaborate or pervasive to create a fiduciary obligation in the United States." *Id.* at 1558.

On appeal, the United States argued that under *Mitchell II*, fiduciary "liability only comes into existence when the government actively manages the land at issue." *Id.* We disagreed, reasoning that:

> Brown contends, quite correctly, that the trial court erred in the instant case by imposing a more restrictive test for the existence of a fiduciary duty than was established by *Mitchell II*. The Supreme

amended in 1970 and this portion of the statute may now be found in subsection (a) of current section 415.

[10] That regulation, in pertinent part, empowered the Secretary of the Interior to terminate a lease made under section 415 "[u]pon a showing satisfactory to the Secretary that there has been a violation of the lease or the regulations in this part."



> Court did not qualify "control or supervision" with modifiers such as "significant," "comprehensive," "pervasive," or "elaborate." Nor did the Court anywhere suggest that the assumption of either control or supervision alone was insufficient to give rise to an enforceable fiduciary duty.

*Id.* at 1561. We therefore determined that "[t]he proper test of whether the government has assumed fiduciary duties in the commercial leasing of allotted lands is thus whether," under the pertinent statutes and/or regulations, "the Secretary [of the Interior], rather than the allottees, has control or supervision over the leasing program." *Id.*[11]

In the present case, the 1960 Act authorizes the government to use the Tribe's trust property for governmental purposes. Pub. L. No. 86-392, 74 Stat. 8 (1960) (creating trust "subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes. . . ."). We think that, to the extent that the government has actively used any part of the Tribe's trust property, and has done so in a manner where its control over the buildings it occupies is essentially exclusive, the portions of the property that have been so used can no longer be classified as being held in merely a "bare trust" under *Mitchell I*. Rather, the government's decision to use such trust property for its own purposes carries a responsibility to act as a fiduciary. Although

[11] We note, however, that even where the government has neither control nor supervision of trust property it may have certain fiduciary obligations. *See, e.g., Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 39 S. Ct. 185, 63 L. Ed. 504 (1919) (holding that United States could not alienate trust lands currently occupied by Native Americans).

neither the 1960 Act nor any pertinent regulation sets forth clear guidelines as to how the government must manage the trust property, we think it is reasonable to infer that the government's use of any part of the property requires the government to act in accordance with the duties of a common law trustee, as is discussed in greater detail below. *See Restatement (Second) of Trusts* § 176 cmt. b (1959) ("It is the duty of the trustee to use reasonable care to protect the trust property from loss or damage."). Such a duty would apply only as to the specific parcels of trust property that the federal government has used and controlled, and possibly the grounds immediately surrounding such parcels.

The record in this case is unclear as to the extent of the government's control and use of the many buildings and grounds comprising Fort Apache. The Tribe alleges in its complaint that it "has not had control over the Tribe's buildings and improvements used, occupied, controlled, supervised and managed by [the United States] for Federal government administrative and school purposes." To the extent that the federal government has, indeed, used buildings to the exclusion of the Tribe, we think the federal government does owe a fiduciary duty. Where such use and control was absent, the government owes no such duty. On remand the Court of Federal Claims must determine which portions of the trust property were under exclusive United States control and thus the subject of a fiduciary obligation.[12]

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[12] If any of the buildings was constructed after the creation of the trust in 1960, the government's obligation with respect to those buildings may be quite different.



## V

We must next determine whether the complaint here states a claim enforceable in a present suit for money damages with respect to the property controlled by the United States. It is undisputed that the 1960 Act does not explicitly define the government's obligations. Once we have determined that a fiduciary obligation exists by virtue of the governing statute or regulations, it is well established that we then look to the common law of trusts, particularly as reflected in the *Restatement (Second) of Trusts*, for assistance in defining the nature of that obligation. For example, in *Mitchell II*, the Court relied upon the *Restatement (Second) of Trusts* and secondary authorities to inform its discussion of the remedies available to beneficiaries for a trustee's breach of its obligations. *Mitchell II*, 463 U.S. at 226, 103 S. Ct. 2961. This approach by the Court follows on several decisions in breach of trust cases brought by Native Americans that similarly relied upon the Restatement or secondary authorities on the common law of trusts. For example, in *Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S. Ct. 1049, 86 L. Ed. 1480 (1942), the Court cited with approval the *Restatement (First) of Trusts* when adjudicating a breach of trust claim brought against the United States by a Native American tribe. *See also United States v. Mason*, 412 U.S. 391, 398, 93 S. Ct. 2202, 37 L. Ed. 2d 22 (1973) (relying on secondary authority); *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, ——, 121 S. Ct. 1060, 1068, 149 L. Ed. 2d 87 (U.S. 2001) (citing to the *Restatement (Second) of Trusts*); *cf. Kolstad v. American Dental Ass'n*, 527 U.S. 526, 538, 541, 119 S. Ct. 2118, 144 L. Ed. 2d 494 (1999) (looking to

Restatements of Torts and Agency for guidance in interpreting federal statute).

Under the common law of trusts, it is indisputable that a trustee has an affirmative duty to act reasonably to preserve the trust property. As the Restatement makes clear, "[t]he trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property." *Restatement (Second) of Trusts* § 176 (1959). Comment (b) to this provision makes clear that this obligation extends to the protection of the trust property from loss or damage: "It is the duty of the trustee to use reasonable care to protect the trust property from loss or damage."

In *Masayesva ex rel. Hopi Indian Tribe v. Hale*, 118 F.3d 1371, 1385 (9th Cir. 1997), *cert. denied*, 522 U.S. 1114, 118 S. Ct. 1048, 140 L. Ed. 2d 112 (1998), the Hopi Tribe brought a breach of trust action against, *inter alia*, the United States, to recover damages for the overgrazing, by another tribe's cattle, of land held in trust by the United States for both tribes. While affirming the district court's judgment of no liability, the Ninth Circuit noted that the district court appeared to have applied the wrong standard because it applied a "reasonable person" rather than a "reasonable trustee" standard:

> Since the government's liability is predicated on trust obligations, it need take those protective measures that a reasonable or prudent trustee would take. Restatement, (Second) Trusts, § 176.

*Id.* at 1385 (internal citations omitted). *See also Coast Indian Community v. United States*, 213 Ct. Cl. 129, 550 F.2d 639, 653 (Ct. Cl. 1977) (per curiam) (adopting trial court's decision which awarded damages to



individual Native Americans for government's breach of its fiduciary obligation "to exercise due care and prudence to preserve the trust property"); *cf. Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 637 (10th Cir. 1998) (noting that the common law of trusts obligates a trustee to "take steps to preserve the trust property from loss, damage or diminution in value"), *cert. denied*, 526 U.S. 1068, 119 S. Ct. 1461, 143 L. Ed. 2d 546 (1999); *Pelt v. Utah*, 104 F.3d 1534, 1542-44 (10th Cir. 1996) (concluding, based in part on application of section 2 of the *Restatement (Second) of Trusts* (1959), that individual Native Americans beneficiaries of an oil and gas royalty trust fund had properly stated a breach of trust claim arising from Utah's alleged mismanagement of that fund).

Other secondary authorities support the proposition that the trustee has an affirmative duty to act reasonably to preserve the trust property. As Professor Bogert has noted:

> The trustee has a duty to protect the trust property against damage or destruction. He is obligated to the beneficiary to do all acts necessary for the preservation of the trust res which would be performed by a reasonably prudent man employing his own like property for purposes similar to those of the trust.

George G. Bogert, *The Law of Trusts and Trustees*, § 582, at 346 (2d ed. 1980). *See also* 2A Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 176, at 482 (4th ed. 1987) ("It is the duty of the trustee to use care and skill to preserve the trust property. The standard of care and skill which is applicable to this duty, as it is to his other duties, is that of a man of ordinary prudence.") [hereinafter Scott & Fratcher].

Here we believe that general principles of trust law obligate the United States "to use reasonable care and skill," *Restatement (Second) of Trusts* § 176, to "preserve the trust property from loss, damage or diminution in value." *Branson Sch. Dist. RE-82*, 161 F.3d at 637. This obligation includes an obligation to make appropriate repairs to buildings. As stated in 3 Scott & Fratcher, § 188.2, at 53-54, "[t]he trustee is ordinarily under a duty to keep in proper repair buildings and other property that he holds in trust. . . . Such repairs include whatever is reasonably necessary to preserve the property and to keep it in proper condition." The government as trustee "owes the beneficiary [here, the Tribe] the duty of using the care of a reasonably prudent man in protecting the trust res against decay and deterioration caused by use, by the elements, by catastrophe, or otherwise. . . ." Bogert, *The Law of Trusts and Trustees*, § 600, at 513. Indeed, under the common law of trusts, "[t]he first duty of a trustee must be to preserve the trust property intact. To do this, he must not suffer the estate to waste or diminish, or fall out of repair. . . ." *Id.* at 514.

A trustee's failure to act reasonably to preserve the trust property will also support a claim for permissive waste, a type of claim which is analogous to a claim under the law of property. "Waste" is generally defined as "the destruction, alteration, misuse, or neglect of property by one in rightful possession to the detriment of another's interest in the same property." 8 Richard R. Powell & Michael A. Wolf, *Powell on Real Property*, ¶ 636, at 56-3 (2000).

"Permissive waste," in turn, generally results "from the failure of the possessor to exercise the care of a reasonable person to preserve and protect the estate



for future interests." 8 *id.* ¶ 640[3], at 56-22. That "care of a reasonable person" accordingly requires a tenant to "keep the premises in the condition it was in when the tenancy began, general wear and tear excepted." 8 *id.* ¶ 640[3], at 56-25.

In short, the government here has a fiduciary obligation to act reasonably to maintain and repair the trust property. It is also well settled that where, as here, a trust is created for successive beneficiaries, the trustee owes a duty to act impartially as between or among them. As the Restatement makes clear, "[i]f a trust is created for beneficiaries in succession, the trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests." *Restatement (Second) of Trusts* § 232 (1959). The court must be particularly careful in scrutinizing the government's actions since the government's simultaneous role as trustee and beneficiary of the trust creates a conflict of interest as to the fulfillment of that fiduciary obligation. Indeed, this type of conflict is hardly unique. It is axiomatic that where the sole trustee is one of the beneficiaries, there is a "danger that the trustee will unduly favor himself. 2 Scott & Fratcher, § 99.3, at 63. Actions of the trustee in such a situation "might well be subject to careful scrutiny to determine whether in view of [its] antagonistic interest [it] was abusing the discretion conferred upon" it to fulfill its obligations to the Tribe. 2 *id.* § 107.1, at 120.

Application of these principles mandates that "[w]here the trustee is one of the beneficiaries, he will not be permitted in the administration of the trust to favor his own interest at the expense of that of other beneficiaries." 2A *id.* § 183, at 560. In other words, notwithstanding its role as a beneficiary, the United

States as trustee is required "to act with due regard" to the interests of the Tribe in the trust property. *Restatement (Second) of Trusts* § 232 (1959).

While we look to the law of trusts for the general principles that govern the obligations of the United States as trustee, in each case we must also examine the particular statute, treaty, "or other fundamental document," *Mitchell II*, 463 U.S. at 225, 103 S. Ct. 2961, that creates the trust relationship in order to determine the nature of that relationship and whether the general law of trusts has been altered in any particular way, either by the imposition of additional obligations or by the modification of existing obligations. Here, we believe that the 1960 Act establishes several important principles.

First, the right of the United States to use the trust property is expressly limited to use for "administrative or school purposes." Pub. L. No. 86-392, 74 Stat. 8 (1960). Use of the property for other purposes constitutes a breach of trust. Indeed, the government appears to agree, but urges that such impermissible uses have not occurred here.

Second, the reasonableness of the government's actions are to be measured by the potential loss of economic value to the Tribe unless the Tribe can establish that the United States, when it passed the 1960 Act, undertook an obligation to maintain the property for other purposes. Indeed, as the Restatement makes clear, "[t]he intention of the settlor which determines the terms of the trust is his intention *at the time of the creation of the trust. . . .*" *Restatement (Second) of Trusts* § 4 cmt. a (emphasis added). Our attention has been directed to nothing in the statute, its background, or its legislative history that suggests that



the United States assumed any obligation to maintain the property for aesthetic or historical purposes. Absent further evidence that the trust created by the 1960 Act had non-economic purposes, the Court of Federal Claims must assume that the purpose was entirely economic.

Third, the obligation of the United States to maintain the property for eventual transfer to the Tribe must be defined in light of the anticipated duration of the United States' use of the trust property at the time the 1960 Act was passed; the possible need of the United States to modify or demolish existing structures in order to make use of the property during the period of United States occupancy; and the economic value of the property at the time of the alleged breach. In deciding these questions, the propriety of the actions of the United States is to be measured against the standard of a reasonable trustee. *Restatement (Second) of Trusts* § 176.

Finally, in addition to an obligation to maintain and repair the property, the United States may be obligated to restore the property upon transfer to the Tribe if the United States has violated its maintenance obligations during the term of the trust[13] or if it has (properly) modified the property to suit its own needs during the term of the trust. We do not suggest that the occurrence of normal wear and tear obligates the United States here to restore the property to its

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[13] *See Restatement (First) of Property* § 187 cmt. b at 760 (1936) (stating that where the owner of a life estate has improperly altered a building, the owner of an indefeasibly vested future interest in that building can compel the "restoration of the premises to the condition in which they were prior to the doing of the prohibited act").

original (1960) condition, and we otherwise express no views as to the existence or nature of an obligation to restore the property, which must be determined by the general law of trusts as modified by the 1960 Act.

## VI

It remains only to be determined whether breach of the government's obligations, if proven by the Tribe on remand, gives rise to a presently cognizable claim for money damages. We hold that it does. As the Supreme Court held in *Mitchell II*:

> Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust.

*Mitchell II*, 463 U.S. at 226, 103 S. Ct. 2961. The Restatement of Trusts provides further support for this proposition. *Restatement (Second) of Trusts* § 205 (1959) ("If the trustee commits a breach of trust, he is chargeable with (a) any loss or depreciation in value of the trust estate resulting from the breach of trust; . . .").

While the Court of Federal Claims appeared to recognize that a traditional breach of trust claim, if one was available, necessarily states a claim for money damages, that court appeared to suggest that a damages remedy for permissive waste by analogy to the law of property could not be maintained at all, and that the only available remedy was injunctive. In this the court was mistaken.

The Court of Federal Claims observed that "an action for permissive waste, even if proper, does not ordinarily give rise to a money claim." *White Mountain*



*Apache Tribe*, 46 Fed. Cl. at 28. The government urges that sections 188, 189, and 195 of the *Restatement (First) of the Law of Property* (1936) apply to the Tribe's claims and support the court's holding. But those provisions have no application here. That Restatement is clear that it does not directly apply to trust situations. *Id.*, note to ch. 13, at 753 ("When the person seeking protection has a future beneficial interest under a trust, the protections available to him . . . are a part of the Law of Trusts and are outside the scope of this Restatement."). In any event, those provisions discuss the remedies available to owners of *contingent* future interests in property when the present holder of a life estate acts or fails to act in a manner causing damage to that property. For example, section 188 of the Restatement provides, in pertinent part, that the holder of a contingent future interest in property "cannot recover damages immediately payable to himself for any act or omission of the owner of the estate for life."[14] Similarly, section 189 provides, in pertinent part, that the owner of a contingent future

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[14] Section 188 provides: "When a present estate for life precedes a future interest in fee simple which is subject to a condition precedent, or which is vested but defeasible either in whole or in part upon an event the occurrence of which is not improbable, then the owner of such future interest, in a judicial proceeding brought solely in his own behalf, cannot recover damages immediately payable to himself for any act or omission of the owner of the estate for life." *Restatement (First) of Law of Property* § 188 (1936). Comment (a) accompanying this section makes clear that it applies *only to holders of uncertain* future interests: "All situations to which the negative rule in this Section is applicable have two elements in common. . . . *The second of these is an uncertainty as to the future interest.*" *Id.* cmt. a, at 765-66 (emphasis added). Here, however, there is no "uncertainty as to the future interest" of the Tribe in the trust property.

interest can obtain a variety of equitable remedies against the present injurious owner of a life estate in property, including "a prohibitive injunction appropriate to prevent the future doing of affirmative acts of the type theretofore done, or threatened to be done, by the owner of the estate for life." *Id.* at § 189(a).

There is nothing contingent about the Tribe' s future interest in the trust property. In other words, nothing can divest the Tribe of full title to that property once the government terminates its trust relationship. The Tribe's interest in the trust property is accordingly better described as an indefeasibly vested future interest, and the government's interest better described as one akin to a present life estate in the trust property.

Under these circumstances, the more nearly analogous provisions are sections 139 and 187 of the *Restatement (First) of Property* (1936). Under those sections, a beneficiary has an immediate claim for money damages for any alleged failure to maintain and repair buildings.

For example, section 139, entitled "Duty Not to Permit Deterioration of Land or Structures," provides, in pertinent part, that (subject to certain exceptions not applicable here) "the owner of an estate for life . . . has a duty to preserve the land and structures in a reasonable state of repair. . . ." Moreover, comment (c) to that section provides, in pertinent part, that:

> A repair or act of preservation is clearly within such duty whenever such repair or act is necessary to prevent a progressive deterioration of the land or structures or whenever the condition existing as a result of the failure to make such repair will amount to substantial deterioration of the land or structures



> from the condition in which such land and structures were at the time of the commencement of the estate for life.

*Id.* at § 139 cmt. c. Section 187 of the Restatement further provides that the owner of an indefeasibly vested future interest has the right to expect compliance by the owner of the life estate with this duty of preservation:

> When the ownership of land is divided into two interests, one being a present estate for life and the other being an indefeasibly vested future interest in fee simple absolute, then the future interest includes (a) a right correlative to each of the duties of the owner of an estate for life, [as] stated in . . . § 139 (duty not to permit deterioration of land or structures). . . . *Id.* at § 187.

Finally, an accompanying comment makes clear that in the event the owner of the preceding estate—here, the United States—breaches this duty, the owner of the indefeasibly vested future interest can recover immediate damages for that breach:

> When the right of the owner of the future interest is that the owner of the estate for life shall do a given act, as for example, . . . make repairs (see § 139), then this right is made effective through compelling by judicial action the specific doing of the act in question, *or through giving to the owner of the future interest a judgment for the damages caused to him by the omission to act.*

*Id.* at § 187 cmt. b, at 759 (emphasis added).[15]

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[15] The dissent concludes that there is no right to sue for damages because the Tribe's future interest is "contingent" under section 187 of the *Restatement (First) of Property*, there being "no certainty that the Tribe's future interest will ever vest." Even if the *Restatement (First) of Property* were the correct source of law for trust questions, enjoyment of the estate by the Tribe was certain because Congress, in providing for a remainder interest in the Tribe, plainly did not contemplate that the government's use for administrative or school purposes would be perpetual.

While the timing of the end of the government's use may have been uncertain, there was no question that the Tribe had the only remainder interest and that that interest was therefore indefeasibly vested rather than contingent. *See Restatement (First) of Property* § 157 cmt. f, at 546 (1936) ("When a remainder is indefeasibly vested, the remainderman is certain to acquire a present interest at some time in the future, and is also certain to be entitled to retain permanently thereafter the present interest so acquired.").

To be sure, the *Restatement (First) of Property* is concerned with the right of a vested remainderman who succeeds after the end of a life estate (section 187) or multiple life estates (section 191), recognizing that the remainderman in both situations has the right to sue for damages. *The Restatement (First) of Property* does not address the timing of a remainderman's suit for damages where the timing of the enjoyment depends upon another event (here the end of the government's administrative or school use). This is hardly surprising since at common law this conveyance would have violated the rule against perpetuities. *See id.* at § 228 cmt. b., illus. 2, at 938 ("A, owning Blackacre in fee simple absolute, transfers Blackacre 'to B County so long as Blackacre is used as the site of the County Court House; thereafter to C and his heirs.' The attempted executory interest to C fails because of a violation of the rule against perpetuities."). The rule against perpetuities, however, is not a limitation on conveyances by the United States government.

This uncertainty in the duration of the prior estate, whether under the law of trusts or the law of property, suggests only that the computation of damages before the end of the preceding use



In sum, we hold that the Tribe's claim gives rise to a cognizable claim for money damages. Accordingly, we hold that the Court of Federal Claims has jurisdiction to entertain it.

## VII

We conclude that the 1960 Act creates an enforceable fiduciary relationship between the United States and the Tribe, the breach of which may give rise to a cognizable claim for money damages. On remand, however, the Court of Federal Claims may determine that the suit is premature as to buildings that the United States continues to use for administrative or school purposes. *See* note 15, *supra*. On remand, the Court of Federal Claims must further determine which portions of the property were under United States control. Even as to the property that was so controlled, we recognize that the existence of this "general fiduciary relationship does not mean that any and every claim . . . necessarily states a proper claim for breach

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may be possible in one situation (life estates) using actuarial tables but may be difficult in the latter situation until the occurrence of the event (here, the end of school or administrative use), and that the right of suit for damages in the latter situation may be premature until the happening of that event (end of statutorily authorized uses). *Cf. Boling v. United States*, 220 F.3d 1365, 1373 (Fed. Cir. 2000) (holding that landowners' "takings claims [for government-caused erosion to property] accrued when the erosion had substantially encroached the parcels at issue and the damages were reasonably foreseeable").

Clearly this lawsuit is not premature as for those buildings that the government has ceased to use for administrative or school purposes. We leave this issue of possible prematurity as to those buildings still used by the government for resolution by the Court of Federal Claims, particularly since decision of those timing issues may affect the running of the statute of limitations.

of the trust a claim which must be fully tried" in the Court of Federal Claims. *Pawnee v. United States*, 830 F.2d 187, 191 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032, 108 S. Ct. 2014, 100 L. Ed. 2d 602 (1988). The merits of the Tribe's claim will be accordingly determined on remand in the light of this decision.

On this appeal, the government also argued that even if the Tribe has stated a proper claim, it is barred under the six-year statute of limitations set forth in 28 U.S.C. § 2501. We note that the Court of Federal Claims did not reach this argument, and we therefore leave this unanswered question to that court for resolution on remand.

**CONCLUSION**

For the foregoing reasons, the decision of the Court of Federal Claims is reversed and remanded.

*REVERSED AND REMANDED.*

No costs.



MAYER, Chief Judge, dissenting.

I would affirm, both because the 1960 Act did not impose a fiduciary duty on the government and because the Tribe does not hold an indefeasibly vested future interest in the Fort Apache land and buildings. In *United States v. Mitchell*, 445 U.S. 535, 542, 546, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980) (*Mitchell I*), the Supreme Court held that statutes and regulations that create only a limited or "bare" trust relationship between the United States and the Tribes do not impose fiduciary obligations which would give rise to money damages. However, in *United States v. Mitchell*, 463 U.S. 206, 224, 103 S. Ct. 2961, 77 L.E. 2d 580 (1983) (*Mitchell II*), the Court found that a fiduciary obligation existed when the statute or regulations give the government full responsibility for managing Indian resources and land for the benefit of the Indians. The statutes and regulations define the scope of the fiduciary obligation. *Id.* We held in *Brown v. United States*, 86 F.3d 1554, 1560 (Fed. Cir. 1996), that the fiduciary duty need not be explicit in the statute or regulation, but the government must take on or have control or supervision of tribal monies or property.

In this case, the 1960 Act, which created the trust, reserved to the government the right to use any part of the land and improvements for administrative or school purposes for as long as they are needed for those purposes. This provision limits the government's obligation to the Tribe and creates a bare trust relationship similar to the General Allotment Act considered in *Mitchell I*. Nothing in the 1960 Act imposes a fiduciary responsibility to manage the fort for the benefit of the Tribe and, in fact, it specifically carves the government's right to unrestricted use for the specified

purposes out of the trust. Although the school is for the benefit of the Tribe, the 1960 Act expressly permits, but does not require, the government to use the fort as an Indian school. The use of the phrase "for as long as they are needed," far from expressing a fiduciary obligation, vests discretion in the Secretary of the Interior to determine how long to operate the Indian school. Because the subject matter of the trust excluded the government's use privilege from the start, it has no fiduciary obligation to maintain the land and improvements for the Tribe that could lead to money damages.

Accordingly, there should be no need to address whether the future interest held by the Tribe is vested or contingent. In reaching the issue, however, the court has misconstrued the nature of the trust and improvidently held that "[t]here is nothing contingent about the Tribe's future interest in the trust property." *White Mountain Apache Tribe v. United States*, *ante* at 25. In fact, the government has reserved the right to use the trust property "for as long as [it is] needed" for school or administrative purposes. Nothing in the grant precludes the possibility that it will be needed in perpetuity for those purposes; there is no certainty that the Tribe's future interest will ever vest. It is therefore contingent and, as the court aptly points out, the owner of a contingent future interest has no right to sue for money damages for permissive waste. *Id.*

The government argued that the Tribe's future interest was contingent and that the common law of property as reflected in sections 188, 189, and 195 of the Restatement (First) of the Law of Property bars the Tribe's claim for monetary damages. The court does not disagree that money damages would be barred if



the Tribe's future interest were contingent; it merely asserts that it is not. Therein lies the error. As the court said,

> Section 188 provides: "When a present estate for life precedes a future interest in fee simple which is subject to a condition precedent, or which is vested but defeasible either in whole or in part upon an event the occurrence of which is not improbable, then the owner of such future interest, in a judicial proceeding brought solely in his behalf, cannot recover damages immediately payable to himself for any act or omission of the owner of the estate for life." *Restatement (First) of Law of Property* § 188 (1936).

*White Mountain Apache Tribe*, *ante* at 24 n.14. The court goes on to note that there must be an uncertainty as to the future interest for this rule to apply, and makes the conclusory statement that there is "no 'uncertainty as to the future interest' of the Tribe in the trust property." *Id.* Contrary to this assertion, there is a condition precedent to the vesting of the Tribe's future interest, namely that the government no longer needs to use the property for school or administrative purposes. Until the Secretary of the Interior determines that the property is no longer needed for school or administrative purposes, the condition precedent will not occur, and the Tribe's interest will not vest. Because there is nothing in the 1960 Act that prevents the government from continuing to use the property for school or administrative purposes indefinitely, there is no guarantee that the condition precedent will ever be met and the Tribe's future interest will ever vest. This precludes its claim for money damages and is an

independent ground on which to affirm the judgment of the Court of Federal Claims.



**APPENDIX B**

UNITED STATES COURT OF FEDERAL CLAIMS

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No. 99-148L

WHITE MOUNTAIN APACHE TRIBE, PLAINTIFF

*v.*

THE UNITED STATES, DEFENDANT

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Nov. 19, 1999

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**OPINION**

FIRESTONE, Judge.

This case comes before the court on defendant's motion to dismiss for failure to state a claim for which relief may be granted and for lack of subject matter jurisdiction. The dispute arises over the federal government's alleged breach of trust to plaintiff, the White Mountain Apache Tribe, with respect to certain property, and improvements thereon, held by defendant in trust for the Tribe. The property and improvements involved, known as "Fort Apache" and the Theodore Roosevelt School, are located on the Fort Apache Indian Reservation in the White Mountains of east-central Arizona. Plaintiff alleges that defendant breached fiduciary obligations owed to plaintiff in failing to maintain, protect, repair and preserve the trust property. Plaintiff seeks damages in the amount of $14,000,000.

Defendant argues that plaintiff fails to state a claim for which relief may be granted, asserting that it owes no trust obligation with respect to the subject property that would give rise to a claim for money damages. Defendant further argues that plaintiff's claim is time barred by the six-year statute of limitations imposed on claims for money damages in this court. After carefully considering the arguments of the parties, the court hereby **GRANTS** defendant's motion to dismiss for failure to state a claim for which relief may be granted.

**FACTS**

This controversy involves land and various improvements thereon, known as "Fort Apache," located within the Fort Apache Indian reservation in east-central Arizona. The United States Army established Fort Apache in 1870. During the 1920's, Congress placed the Fort under the control of the Department of the Interior and reserved a portion of the Fort for use as the Theodore Roosevelt Indian Boarding School.[1] The school presently continues to operate for a small number of students.[2] By Act of March 18, 1960, Congress declared the Fort Apache land, together with the improvements thereon, "be held by the United States

[1] "The Secretary of the Interior is authorized to establish and maintain the former Fort Apache military post as an Indian boarding school for the purpose of carrying out treaty obligations, to be known as the Theodore Roosevelt Indian School: Provided, That the Fort Apache military post, and land appurtenant thereto, shall remain in the possession and custody of the Secretary of the Interior so long as they shall be required for Indian school purposes. 25 U.S.C. § 277 (1994)."

[2] The future of the school as a viable institution is apparently under review. At argument the plaintiff explained that the Tribe anticipates that the property might be available for their use sometime in the near future.



in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose."[3] In November 1965, the Tribe governing council resolved that the area should be placed on the National Historic Register. The National Park Service designated the Fort as a National Historic Site in 1976.

Plaintiff alleges in its complaint that the defendant has allowed the Fort Apache land and improvements to fall into disrepair, and in some cases, buildings have even been demolished, under its use, occupancy, control, supervision, management, and administration. Plaintiff alleges that in 1993, recognizing the extent of the deterioration, it began to take steps to protect the Fort. As part of this effort, plaintiff adopted a master plan for protection, preservation, and restoration of the Fort. Thereafter, in September 1997, the Fort was placed on the World Monument Watch "1998 List of 100 Most Endangered Monuments." The following year, in November 1998, the Tribe commissioned a study of the buildings and obtained cost estimates for their restoration and preservation. Plaintiff further alleges that the Department of the Interior ("DOI") and the Bureau of Indian Affairs ("BIA") have failed to perform the necessary maintenance and repairs to the properties.

In the complaint filed in this court on March 19, 1999, plaintiff seeks $14,000,000 in damages for breach of trust, so that the Tribe can repair and restore the trust property. Plaintiff also seeks unspecified compensation for the "economic loss and value of lease/rental fees for the subject trust corpus." On May 19, 1999, defendant

[3] *See* Pub. L. No. 86-392, 74 Stat. 8.

moved to dismiss the case for failure to state a claim for which relief may be granted and lack of jurisdiction. In particular, defendant denies that it has any trust responsibility to restore or maintain Fort Apache and the Theodore Roosevelt School in a fashion that could give rise to a money-damages claim. In addition, defendant argues that plaintiff's claim is, in any event, barred by the six-year statute of limitations governing suits filed under 28 U.S.C. §§ 1491 and 1505 because plaintiff knew or should have known of the deteriorated state of the property for more than six years.

The motion has been fully briefed and oral argument was held on November 8, 1999. For the reasons that follow, defendant's motion to dismiss for failure to state a claim under Rule 12(b)(4) is granted

## DISCUSSION

### 1. Motion to Dismiss

The standard for deciding a motion to dismiss is well settled. In deciding a motion to dismiss, "whether on the ground of lack of jurisdiction over the subject matter, or for failure to state a cause of action," the court must construe the allegations of the complaint most favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974); *see Morris v. United States*, 33 Fed. Cl. 733, 741 (1995). In addition, the court must accept as true any undisputed allegations of fact made by plaintiff. *See Haberman v. United States*, 26 Cl Ct. 1405, 1410 (1992). Ultimately, however, the burden is on plaintiff to establish jurisdiction by a preponderance of the evidence. *See Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988).



### 2. Breach of Trust

Plaintiff bases the court's jurisdiction over this action on the Tucker Act, 28 U.S.C. § 1491(a) (1994) and the Indian Tucker Act, 28 U.S.C. § 1505 (1994). The Tucker Act grants this court jurisdiction over actions "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491. Section 1505 confers jurisdiction on this court to hear any tribal claim that "is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe. . . ." 28 U.S.C. § 1505.

Neither section 1491 nor section 1505, however, creates a substantive right against the United States for money damages. *See United States v. Testan*, 424 U.S. 392, 398, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976). These acts are merely jurisdictional. Where plaintiff has alleged a breach of trust, as in the instant case, the court must first decide the threshold issue of whether the statute or regulations cited by plaintiff create a fiduciary duty on behalf of the defendant, the breach of which would give rise to a claim for money damages. *See United States v. Mitchell*, 463 U.S. 206, 219, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (*Mitchell II*); *Pawnee v. United States*, 830 F.2d 187, 189 (Fed. Cir. 1987). "That there is such a general fiduciary relationship does not mean that any and every claim by the Indian lessor necessarily states a proper claim for breach of the trust—a claim which must be fully tried in the Claims Court." *Pawnee*, 830 F.2d at 191. Whether plaintiff has alleged sufficient facts to support a breach of trust is

secondary to the issue of whether a money-mandating fiduciary relationship exists.

The Supreme Court has established the parameters for our inquiry into whether the statutes and regulations that plaintiff relies upon create fiduciary duties in its *Mitchell I* and *Mitchell II* decisions. *United States v. Mitchell*, 445 U.S. 535, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980) (*Mitchell I*); *Mitchell II*, 463 U.S. at 206, 103 S. Ct. 2961. Read together, these two decisions provide that whether a claim for money damages exists depends upon whether the claimant can prove the government has shown an intent to go beyond the limited, or bare trust relationship that exists between the United States and the Tribes. A claim for money damages requires that the government has expressly or impliedly undertaken to act in a fiduciary capacity toward tribal resources. In order to demonstrate that a fiduciary relationship exists, the claimant must either point to specific statutes or regulations that impose a duty upon the government to manage tribal resources for the benefit of the tribe or demonstrate that the government has actually undertaken to do so. *See Mitchell II*, 463 U.S. at 224-25, 103 S. Ct. 2961.

In *Mitchell I*, the Supreme Court held that statutes and regulations that create only a limited or "bare" trust relationship between the United States and the Tribes do not impose fiduciary obligations, which would give rise to money damages. *See Mitchell I*, 445 U.S. at 545, 100 S. Ct. 1349.[4] At issue in *Mitchell I* was

[4] *See also Eastern Band of Cherokee Indians v. United States*, 16 Cl. Ct. 75, 78 (1988) ("If the source of substantive law establishes only a general trust relationship, the government's fiduciary obligations are not those of a private trustee.") (citing *Montana Bank v. United States*, 7 Cl. Ct. 601, 613 (1985)).



whether the General Allotment Act imposed a duty on behalf of the government to manage the Tribe's timber resources. *See id.* at 542, 100 S. Ct. 1349. The court found that the language and legislative history of the Act indicated that "the [Indian] allottee, and not the United States, was to manage the land." *Id.* at 543, 100 S. Ct. 1349 (citing Indian General Allotment Act, 1, 2, 5, 25 U.S.C. §§ 331, 332, 335). The court further found that Congress directed that the land should be held in "trust" not because it intended to give the government fiduciary obligations, "but simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from state taxation." *Id.* at 544, 100 S. Ct. 1349. Accordingly, the court remanded the case to the Court of Claims to determine if any of the other statutes or regulations cited by plaintiff would provide a basis for imposing a fiduciary duty on the government.

The Supreme Court again had the opportunity to pass on the government's duties with respect to timber resources held in trust by the United States for the Tribe in *Mitchell II*, 463 U.S. at 206, 103 S. Ct. 2961. In *Mitchell II*, the Supreme Court found that the forest management statutes and regulations governing timber resources created a fiduciary relationship between the government and the tribe and that breach of that trust would give rise to a money claim. *See id.* at 224, 103 S. Ct. 2961. The statutes and regulations at issue in *Mitchell II*, gave the Secretary of Interior "comprehensive control" over management of timber resources. *See id.* at 209, 219, 222, 225, 103 S. Ct. 2961. Under the forest management statute, the Secretary of Interior is required to conduct timber sales "based upon a consideration of the needs and best interests of the Indian

owner," and use the proceeds from such sales to benefit the Indians. *Id.* at 209, 103 S. Ct. 2961 (citing 25 U.S.C. §§ 405-407). The regulations further direct the government to manage "the Indian forests so as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests." *Id.* at 224, 103 S. Ct. 2961 (quoting Office of Indian Affairs, Regulations and Instructions for Officers in Charge of Forests on Indian Reservations 4 (1911)). The court found that this language made the government a trustee with respect to the Tribe's timber resources. In addition, the court found that "where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties. . . ." *Id.* at 225, 103 S. Ct. 2961. The court concluded that breach of this fiduciary relationship gave rise to a claim for money damages, which was within the jurisdiction of the Court of Claims. *See id.* at 228, 103 S. Ct. 2961.

The courts have applied this dichotomy between a limited, or bare trust and a fiduciary relationship, that was laid out in the *Mitchell I* and *Mitchell II* decisions, to determine whether a trust relationship exists with respect to other resources. Applying the *Mitchell II* rationale, the Federal Circuit found that statutes and regulations governing oil and gas leases created a fiduciary relationship in *Pawnee v. United States*, 830 F.2d at 190. The court found that the Indian Long-term Leasing Act, 25 U.S.C. § 396, and the Federal Oil and Gas Royalty Management Act, 30 U.S.C. §§ 1701-1757, place the government in the role of trustee with respect to oil and gas resources because these statutes:



> (a) give elaborate powers to Interior with respect to those leases, (b) always call for consideration of the best interests of the Indians, (c) require proceeds of the leases to be given to the Indians and, (d) recognize the existence of a general trust relationship toward the Indians with respect to the oil and gas products of these lands.

*Id.; see also Brown v. United States*, 86 F.3d 1554, 1560 (Fed. Cir. 1996). Based on these factors, the court concluded the mineral leasing acts created fiduciary obligations with respect to mineral leasing similar to the obligations the court found in *Mitchell II* with respect to timber resources. *See Pawnee*, 830 F.2d at 190.[5]

Alternatively, where the claimant cannot demonstrate that the government has "assume[d] the duty of preserving the principal, generating income, and disbursing profits," with respect to the alleged trust property, the courts have not found a fiduciary relationship which would support a claim for money damages. *See, e.g., Grey v. United States*, 21 Cl. Ct. 285, 293 (1990), *aff'd*, 935 F.2d 281 (Fed. Cir. 1991), *reh'g denied*, (1991). In *Grey*, the court refused to find a breach of trust where plaintiff could not point to a

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[5] The court cited various provisions of the acts and their legislative history to support its conclusion. 25 U.S.C. § 396 authorizes the Secretary of Interior to lease Indian lands "for any term of years as may be deemed advisable by the Secretary of the Interior," and "to perform any and all acts . . . necessary for carrying out the provisions of this section in full force and effect." 30 U.S.C. § 1701(b)(4) states that among the purposes of the act is "to fulfill the trust responsibility of the United States for the administration of Indian oil and gas resources." Further, 30 U.S.C. §§ 1714 and 1715 provide for royalty payments to Indians.

statute or regulation that created a duty on behalf of the government that would require the government to manage water delivery to and irrigation of individual farm allotments. *See id.*

Similarly, in *White Mountain Apache v. United States*, 11 Cl. Ct. 614 (1987), a case brought by these same plaintiffs, the court held that the Tribe had not established a trust relationship to protect range lands. In *White Mountain Apache*, the court found that the government had a fiduciary obligation not to overgraze the Indian's land because the government had "undertaken to administer" a program of leasing grazing lands to non-indian livestock owners. *Id.* at 650. Nonetheless, the court also found with respect to protecting the Tribe's land in general that a fiduciary duty giving rise to damages did not exist. *See id.* The court held that "[fiduciary] liability cannot attach for the Government's failure to provide funds for fencing the range to protect the reservation itself from trespass or to protect the range within the reservation grazed by Indian cattle from encroachment by permittee cattle." *Id.*

Tested by these standards and precedents, the court in the present case must determine whether under the statutes and regulations identified by plaintiff the defendant owes plaintiff any specific responsibilities with respect to the Fort Apache buildings and improvements that give rise to a money claim for breach of trust.



**3. The 1960 Act and Other Statutes**

Plaintiff contends that the 1960 Act, the Snyder Act, 25 U.S.C. §§ 2, 13, and various other statutes and regulations impose fiduciary obligations on the government to maintain, protect, repair, and preserve Fort Apache for the benefit of plaintiff. These include: 25 U.S.C. § 277; Title XI of the Education Amendments Act of 1978, 25 U.S.C. § 2005 (1994); Improving America's Schools Act of 1994, 25 C.F.R. Pt. 32.3, 32.4(s)(2); Non-Alienation of Tribal Trust Property, 25 U.S.C. § 177 (1994), 25 C.F.R. § 162.1; and American Indian Trust Fund Management Act, 25 U.S.C. § 4043(c)(5)(C) (1994 & Supp. III 1997). Plaintiff argues that the express trust created by the 1960 Act, in combination with the Snyder Act, and other statutes and regulations, gives the government exclusive control over the Fort Apache site, thereby creating a fiduciary relationship under the standards set forth in *Mitchell II*. Defendant asserts that the government's control over the Fort Apache site, absent any mandate to generate income from the property, is insufficient to create a fiduciary duty to maintain or restore the buildings and improvements at the site, the breach of which would give rise to a money claim. The court agrees with defendant's contentions.

The fundamental flaw in plaintiff's action is that it fails to meet the *Mitchell II* test. Contrary to the plaintiff's contentions, the court views the 1960 Act as similar to the provisions of the General Allotment Act which was found insufficient to establish a money-mandating claim in *Mitchell I*, 445 U.S. at 535, 100 S. Ct. 1349, *Grey*, 21 Cl. Ct. at 285, and *White Mountain Apache*, 11 Cl. Ct. at 614. The 1960 Act merely states that Fort Apache shall be held by the government in trust for the White Mountain Apache Tribe, "subject to

the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed. . . ." Pub. L. No. 86-392, 74 Stat. 8. This language creates a limited, or bare trust relationship between the government and the Tribe. In contrast to the timber management statutes and regulations found to create fiduciary duties in *Mitchell II*, the 1960 Act does not direct the government to manage the Fort Apache site for the benefit of the Tribe. To the contrary, the 1960 Act states that the Secretary of the Interior may use the land and improvements "for administrative or school purposes *for as long as they are needed.*" *Id.* (emphasis added). As the plain language indicates, the Act reserves the Fort Apache site for the federal government's benefit and not for the benefit of the Tribe.[6]

With respect to the Snyder Act, 25 U.S.C. §§ 2 and 13, the court agrees with others of this court who have held that these provisions fail to provide a basis for a money-mandating claim as laid out in *Mitchell II*. In *Allred v. United States*, 33 Fed. Cl. 349 (1995), the court held that the Snyder Act was not a money-mandating statute for jurisdictional purposes. Relying on the Supreme Court's opinion in *Lincoln v. Vigil*, 508 U.S.

[6] Plaintiff also cites 25 U.S.C. § 277 as authority for its proposition that the government is a fiduciary with respect to Fort Apache. Section 277, which preceded the 1960 Act, granted possession of Fort Apache to the Secretary of Interior, authorizing the Secretary to establish the Theodore Roosevelt School. Section 277 did not direct the Secretary to manage Fort Apache or the School to generate income for the Tribe. Moreover, Section 277 vested possession of the Fort in the Secretary, not in the Tribe. Thus, Section 277 fails to establish even a limited trust relationship like that found in *Mitchell I*.



182, 194, 113 S. Ct. 2024, 124 L. Ed. 2d 101 (1993), which held that the "general terms" of the Snyder Act do not mandate that the Indian Health Service spend its general appropriations on specific programs aimed at a particular class of individuals, the court found that, likewise, the "[Snyder] Act does not mandate compensation for claims by individuals." *Allred*, 33 Fed. Cl. at 354 (citing *Lincoln*, 508 U.S. at 194, 113 S. Ct. 2024); *See also Vigil v. Andrus*, 667 F.2d 931 (10th Cir. 1982) (holding that Snyder Act is "too broad" to support a conclusion that Congress intended to impose a duty on the government to provide funds for lunches for all Indian school children).

The court also finds that none of the additional statutes or regulations plaintiff cites create the type of fiduciary duty which would mandate money damages to be paid by the federal government. Title XI of the Education Amendments Act of 1978, 25 U.S.C. § 2005, and the Improving America's Schools Act of 1994, 25 C.F.R. Pt. 32.3, 32.4(s)(2), mandate that the Secretary of Interior shall keep all Indian Schools in compliance with applicable health and safety standards.[7] The American Indian Trust Fund Management Act, 25 U.S.C. § 4043, requires the DOI to certify that budget requests made to Congress are adequate to meet the DOI's trust responsibilities to Indian Tribes.

[7] Plaintiff cites *Busby School v. United States*, 8 Cl. Ct. 596 (1985), to support its claim that 25 U.S.C. s 2005 is a money-mandating statute. In *Busby School*, the court held that plaintiff's breach of trust claim based on Section 2005 "withstands defendant's broad motion to dismiss." *Id.* at 601. However, *Busby School* is distinguishable from the facts in this case because in that case the statutory directive in Section 2005 to repair and maintain Indian schools was expressly made part of contracts between the BIA and the school board. *See id.* at 599.

Although these acts impose upon the Secretary general mandates to aid Native Americans, which may be enforceable through a suit for injunctive relief, like the Snyder Act, they provide no substantive right to money damages for violation of any particular statutory directive.

Relying on *Brown v. United States*, plaintiff argues that, even if the statutes and regulations do not expressly create a fiduciary relationship, defendant's day-to-day occupation, use, control, or supervision of Fort Apache under the 1960 Act, and the other statutes and regulations cited, elevates the relationship between defendant and the Tribe to a fiduciary relationship under the *Mitchell II* "control or supervision" test. *See Brown*, 86 F.3d at 1558-62. Under *Mitchell II*, the Supreme Court explained that where the federal government takes on elaborate control or supervision over tribal resources, "the fiduciary relationship normally exists with respect to such monies or properties . . . even though nothing is said expressly in the authorizing or underlying statute . . . about a trust find, or a trust or fiduciary connection." *Mitchell II*, 463 U.S. at 225, 103 S. Ct. 2961. Plaintiff argues that because the government has exclusive control over Fort Apache, such a fiduciary relationship exists.

Plaintiff's argument, however, misconstrues the *Brown* court's interpretation of *Mitchell II* by focusing on the extent, rather than the nature of control necessary to establish a fiduciary relationship. The court in *Brown* held that the statutes and regulations governing commercial leasing of Indian lands need not give the government "ongoing management responsibility over the day-to-day administration of commercial leases," in order to satisfy the *Mitchell II*



"control or supervision" test. *Brown*, 86 F.3d at 1561. What the *Brown* court emphasized, and the plaintiff ignores, is that the statutes and regulations at issue in *Brown* create a fiduciary relationship because they give the government not just control over the leasing of tribal lands, but control for the purpose of protecting the Indians' financial interests. *See id.* at 1562. The court found a fiduciary obligation because "the Secretary exercises his or her control over commercial leasing on allotted lands not only for traditional general welfare purposes, . . . but also for the purpose of protecting the [Indians'] financial interests." *Id.*

Under the leasing program at issue in *Brown*, the Secretary of Interior was given authority to approve leases and lease cancellations for Indian lands, dictate leasing terms and forms, and cancel leases without the Indian owner's consent. *See id.* at 1561-62 (citing 25 U.S.C. § 415(a); 25 C.F.R. §§ 162.5(a), 162.14). Moreover, the court noted that the criteria that constrain the Secretary's approval power "are identical to those which traditionally constrain the discretion of a private trustee." *Id.* at 1562. The regulations prohibit approval of leases "at less than the present fair annual rental," and require that "the leases be limited to the minimum duration . . . that will allow the highest economic return to the owner." *Id.* (quoting 25 C.F.R. § 162.5(b), 162.8) (alteration in original). The court concluded that such control over the leasing of Indian lands for the purpose of protecting the Indian financial interests, although not as pervasive as the statutory and regulatory scheme in *Mitchell II*, nevertheless, created a

fiduciary relationship which would support a claim for money damages. *See id.* at 1563.[8]

The 1960 Act and the additional statutes and regulations plaintiff relies upon here are clearly distinguishable from the statutory and regulatory scheme in *Brown*. The 1960 Act and the other statutes and regulations cited by plaintiff do not require the government to manage or operate the Fort Apache site for the Tribe's benefit. Although the cited statutes and regulations may give the government complete control over the Fort Apache site, they do not require that the government manage the Fort Apache site for the purpose of protecting the tribe's financial interests. Indeed, the 1960 Act allows the government to manage and operate the land and buildings for its own benefit for as long as it needs them. Consequently, the statutes and regulations identified by plaintiff do not give rise to fiduciary obligations that allow for monetary claims.

**4. Permissive Waste**

Plaintiff recognized at oral argument that to hold the government liable for money damages where the government has the right to use the trust property for its own purposes calls for an extension of *Mitchell II*. However, plaintiff asserts that where, as here, the government uses the property held in trust for the

[8] In its complaint, plaintiff makes the argument that the Non-Alienation of Tribal Trust Property Act, 25 U.S.C. § 177, and the regulations found at 25 C.F.R. § 162.1, which were at issue in Brown, give rise to a claim for money damages for breach of trust in the instant case. The court finds these provisions inapplicable here, where the government is not charged with the responsibility of overseeing commercial leases for the benefit of the Tribe, but rather is authorized under the 1960 Act to use the Fort Apache site for its own purposes.



Tribe, it has a duty to preserve the property so that when it is eventually returned to the Tribe it is in a usable condition. Plaintiff likens the historic buildings on the Fort Apache site to a trust corpus, similar to the water rights at issue in *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417 (1991). Plaintiff asserts that the historic buildings—the trust corpus—cannot be destroyed through defendant's neglect, and then returned to the tribe in a worthless state. According to plaintiff, the defendant has a duty to maintain the property in accordance with, at a minimum, the government's own standards for maintaining historic properties.[9]

Plaintiff argues that the defendant's failure to preserve the property is tantamount to "permissive waste," and as such amounts to a breach of trust. While the court is not unsympathetic to plaintiff's concerns, the difficulty with plaintiff's argument is that an action for permissive waste, even if proper, does not ordinarily give rise to a money claim. *See* J.A. Bryant, Jr., Annotation, *Right of Contingent Remainderman to Maintain Action for Damages for Waste*, 56 A.L.R. 3d 677 §§ 2-3 (1974, *Supp.* 1998). The law on "permissive waste"

[9] Plaintiff relies on the National Historic Preservation Act of 1966, ("NHPA"), and its implementing regulations as defining the scope of the federal government's fiduciary obligations with respect to the Fort Apache site. *See* 16 U.S.C. §§ 470 to 470x-6 (1994 & Supp. III 1997); Executive Order No. 11593 (May 13, 1971); and 36 C.F.R. § 800 (1988). Plaintiff recognized at argument that these provisions are procedural in nature and do not affirmatively mandate preservation of historic buildings or other resources. *See National Trust for Historic Preservation v. Blanck*, 938 F. Supp. 908, 925 (D.D.C. 1996) (holding that Congress did not intend the NHPA to create affirmative preservationist responsibilities on the government).

provides that the appropriate remedy for permissive waste is generally an injunction:

> "[A] contingent remainderman of a life estate, whose contingency is not improbable, cannot, acting alone, recover damages immediately payable to himself for waste committed by the life tenant. However, he may, even when acting alone, secure a prohibitive injunction, a mandatory injunction, or a determination of damages. and their impoundment until the occurrence or defeat of the contingencies. . . ."

*See id.* at 2, 4 (citing *American Law Institute Restatement of the Law of Property* § 188, 189, 195). Thus, even assuming a cause of action for permissive waste is triggered under the facts of this case, this court does not have jurisdiction over such a claim.

This court does not, without express statutory authority, have jurisdiction to enter injunctive relief. *See United States v. King*, 395 U.S. 1, 4, 89 S. Ct. 1501, 23 L.Ed.2d 52 (1969); *Beck v. Secretary of Dep't of HHS*, 924 F.2d 1029, 1036 (Fed. Cir. 1991). Thus, the court does not have jurisdiction to enter an injunction with respect to the property in question. The plaintiff's reliance on injunctive relief cases to suggest that this court has jurisdiction over a permissive waste claim is misplaced. *See Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1972) (in light of fiduciary duty owed the tribe, regulation allocating water supply based on a "judgement call" by the Secretary was arbitrary and capricious); and *Blue Legs v. United States*, 867 F.2d 1094 (8th Cir. 1989), *enforced sub. nom., Blue Legs v. EPA*, 732 F. Supp. 81 (D.S.D. 1990) (holding that RCRA and Snyder Act trust obligation required BIA and Indian Health Service to clean up open dumps on reservation); *See also Pit River Home Agriculture v. United States*, 30 F.3d 1088, 1098 (1994) ("5 U.S.C. § 702 waives sovereign immunity in non-monetary actions against the United States") (citing *Mitchell II*, 463 U.S. at 227 n.32, 103 S. Ct. 2961). The court, of course, does not reach whether plaintiff may, based on these precedents, maintain an action for injunctive relief in an appropriate district court based on a breach of trust claim for permissive waste.



Finally, plaintiff's contention that this court could award the Tribe $14,000,000 in money damages so that it can fulfill the government's obligation to restore the historic buildings at Fort Apache goes well beyond the established law of this court. Plaintiff is unable to point to any authority which supports its assertion that an action for permissive waste establishes a money-mandating claim, as required under the Supreme Court's opinion in *Mitchell II*. As explained above, to the extent permissive waste may constitute a breach of trust, it is a claim for injunctive relief and does not extend to a claim for immediate money damages.

In such circumstances, plaintiff's action for breach of trust based on the above-noted statutes and regulations fails to state a claim for money damages in this court. Accordingly, it must be dismissed.

**5. Statute of Limitations**

Defendant also argues in its motion to dismiss that this court lacks jurisdiction over plaintiff's claim because it is time barred by the six-year statute of limitations. Absent a specific statute of limitation, a suit against the United States in the Court of Federal Claims is barred unless it is brought within six years of the date upon which the claim first accrued. 28 U.S.C.

§ 2501 (1988). "A cause of action against the government 'first accrued' only when all the events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence." *Fort Indian Tribe*, 23 Cl. Ct. at 428 (quoting *Hopland Band v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988)). Defendant asserts that because plaintiff "was or should have been aware" of the deteriorated state of the Fort Apache site since 1979, plaintiff's claim "accrued" beyond the six-year statute of limitations. Plaintiff argues that it was not aware of its claim until 1998. Having concluded that plaintiff has failed to state a claim for relief, the court does not reach defendant's alternative basis for dismissal.

**CONCLUSION**

For the reasons stated above, the court finds that plaintiff has failed to prove a fiduciary obligation on behalf of the defendant that would give rise to a claim for money damages, and therefore fails to state a claim for which relief may be granted in this court. Accordingly, defendant's motion to dismiss for failure to state a claim is **GRANTED**. The case is hereby **DISMISSED**.



**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

---

No. 99-148 L

WHITE MOUNTAIN APACHE TRIBE

*v.*

THE UNITED STATES

---

[Filed: Nov. 19, 1999]

---

**JUDGMENT**

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Pursuant to the court's Published Opinion, filed November 19, 1999, granting defendant's motion to dismiss for failure to state a claim,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed.

Margaret M. Earnest
Clerk of the Court

November 19, 1999 By: Lisa L. Illegible
Deputy Clerk
90-2-4-09141

**NOTE**: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of *all plaintiffs*. Filing Fee is $105.00.

**APPENDIX D**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

---

No. 00-5044

WHITE MOUNTAIN APACHE TRIBE,
PLAINTIFF-APPELLANT

*v.*

UNITED STATES, DEFENDANT-APPELLEE

---

**ORDER**

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on August 29, 2001.

FOR THE COURT,

/s/ JAN HORBALY
JAN HORBALY

Dated: August 22, 2001

cc: Robert C. Brauchli
Elizabeth Ann Peterson



**APPENDIX E**

1. 25 U.S.C. 277 states:

**§ 277. Former Apache military post established as Theodore Roosevelt Indian School**

The Secretary of the Interior is authorized to establish and maintain the former Fort Apache military post as an Indian boarding school for the purpose of carrying out treaty obligations, to be known as the Theodore Roosevelt Indian School: *Provided*, That the Fort Apache military post, and land appurtenant thereto, shall remain in the possession and custody of the Secretary of the Interior so long as they shall be required for Indian school purposes.

2. 28 U.S.C. Section 1491(a)(1) states in part:

**§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority**

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

3. 28 U.S.C. Section 1505 states:

**§ 1505. Indian claims**

The United States Court of Federal Claims shall have jurisdiction of any claim against the United States

accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Execution orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

Supreme Court, U.S.
FILED
MAR 22 2002
CLERK

(2)

No. 01-1067

IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner,*

*v.*

WHITE MOUNTAIN APACHE TRIBE,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

The Act of March 18, 1960, Pub. L. No. 86-392 (74 Stat. 8) ("1960 Act") states:

> [A]ll right, title and interest of the United States in and to the lands, together with the improvements thereon, included in the former Fort Apache Military Reservation, created by Executive Order of February 1, 1877, and subsequently set aside by the Act of January 24, 1923 (42 Stat. 1187), as a site for the Theodore Roosevelt School, located within the boundaries of the Fort Apache Indian Reservation, Arizona, are hereby declared to be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose.

The Question Presented is whether the 1960 Act and subsequent use and exclusive control of the trust property by the Secretary of Interior, for school or administrative purposes, creates a fiduciary obligation on the part of the United States to maintain and preserve the subject trust property so used, the breach of which would state a claim for damages in the Court of Federal Claims.

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## STATEMENT OF THE CASE

This case presents the question of whether a 1960 Act of Congress, Pub. L. No. 86-392, 74 Stat. 8 (1960), (the "1960 Act"), which declared certain land and improvements (buildings) in trust for the White Mountain Apache Tribe ("Tribe") but which authorized the Secretary of Interior to use the land and improvements for school or administrative purposes, established a fiduciary relationship and an obligation upon the United States to maintain, preserve, and repair the property and buildings while being used and controlled by the Secretary of Interior for school or administrative purposes, so that the Tribe can maintain a suit for damages in the Court of Federal Claims for failure of the United States to maintain, repair and otherwise preserve the property and buildings.

Respondent White Mountain Apache Tribe ("Tribe") submits its own Question Presented as it objects to the form of the Government's "Question Presented," the first two lines of which state: "In 1960, Congress declared that a former military post in Arizona *would* be held by the United States in Trust for the White Mountain Apache Tribe." Use of the conditional tense "would" does not appear in the 1960 Act or the legislative history.[1] Respondent disagrees with the Government's

1. The term "would" reflects the Government's argument that beneficial title to that part of the former military post used by the Secretary for school or administrative purposes was not conveyed to the White Mountain Apache Tribe by Congress on March 18, 1960, that Congress only granted a contingent future interest to the Tribe, and that beneficial title to the subject land and improvements (buildings) is being "held in trust" by the Secretary of the Interior until such time as the Secretary no longer needs them for school or administrative purposes. The Government's Statement commits the same error. Petition, 3 (hereinafter "P.").

The Government's "Question Presented" also fails to include whether the Secretary's actual use and exclusive control of the Tribe's trust property for school or administrative purposes pursuant to the 1960 Act gives rise to the type of fiduciary relationship and obligation which would support a claim for damages against the United States in the Court of Federal Claims.

description of how the Court of Appeals reached its opinion below. The court did not, as the Government claims, initially look to the common law of trusts to find a "full fiduciary relationship," but, rather, conducted a careful analysis of the 1960 Act and control by the Secretary of the Interior of the subject trust property in accordance with this Court's opinions in *Mitchell I* and *Mitchell II*. P. App. 10a-18a. The Court of Appeals looked to the *Restatement (Second) of Trusts*, as this Court did in *Mitchell II*, only after it determined that a fiduciary relationship was established by the 1960 Act *and* the Government's control over the subject trust corpus. The Tribe, in the interest of insuring that this Court receive a clear statement of the material facts and proceedings below in the Court of Appeals, submits its own Statement of the Case.

1. The Tribe is a Federally recognized Indian Tribe, organized under Section 16 of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 476. The Tribe's White Mountain Apache Indian Reservation, a/k/a Fort Apache Indian Reservation, was established by Executive Order on November 9, 1871.[2]

2. On January 26, 1877, the Fort Apache military site of some 7,597 acres was removed from the Reservation and restored to the public domain. On February 1, 1877, by Executive Order, the Fort Apache military site of 7,597 acres was removed from the public domain and made a military reserve.

3. The Army operated Fort Apache as a military post until 1922, when Congress transferred control of Fort Apache to the Secretary of the Interior, and authorized the Secretary to establish

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2. The Government gratuitously lists some of the Tribe's enterprises (P., 3, n.1). Their only relevance to this case is that most of the Tribe's enterprises depend upon tourism, hence the Tribe's attempt to preserve for its tourism-based economy the last nonmechanized military post in the United States and one known worldwide by name alone — "Fort Apache." Government's Petition, Appendix, 4a, n.5, hereinafter "P. App. __."



and maintain the former Fort Apache military post as an Indian boarding school for the purpose of carrying out a treaty obligation,[3] to be known as the Theodore Roosevelt Indian School. Congress also provided, that the military post and land appurtenant thereto shall remain in the possession and custody of the Secretary of the Interior so long as they shall be required for Indian school purposes, 25 U.S.C. § 277, 42 Stat. 1187, c.a. January 24, 1923. P. App., 59a.

4. On March 18, 1960, all right, title, and interest of the United States in and to the lands, together with the improvements [buildings] thereon, included in the former Fort Apache military reservation and subsequently set aside as a site for the Theodore Roosevelt School, were declared by Congress to be held by the United States in trust for the White Mountain Apache Tribe.[4] The Government incorrectly states that "Congress 'declared' that Fort Apache *would* be held by the United States in trust for the . . . Tribe," (P., 3). The term "would" does not appear

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3. This treaty obligation to the Navajo Tribe was abolished in 1933.

4. **Title held in trust**. Act March 18, 1960, Pub. L. No. 86-392, 74 Stat. 8, provided:

> *All right, title, and interest of the United States in and to the lands, together with the improvements thereon*, included in the former Fort Apache Military Reservation, created by Executive order of February 1, 1877, and subsequently set aside by the Act of January 24, 1923 (42 Stat. 1187) [this section], as a site for the Theodore Roosevelt School, located within the boundaries of the Fort Apache Indian Reservation, Arizona, *are hereby declared to be held by the United States in trust for the White Mountain Apache Tribe*, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose.

(Emphasis added) Respondent's Lodging with the Court, L-3, hereinafter, "R. L. ___."

anywhere in the text of the 1960 Act, n.4, *supra*, or in the legislative history.[5] *See* Respondent's objection, *supra*, 1, n.1.

5. Since 1960, the Secretary has controlled, used, occupied, supervised, managed and administered certain portions of the Tribe's trust property, comprised of land, buildings and other improvements within the former Fort Apache military post and Theodore Roosevelt School for school or administrative purposes. Complaint, Para. 13.

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5. The Senate Report accompanying S.2268 states that the Purpose Of The Bill ". . . is to provide that the United States holds in trust approximately 7,579 acres of land, together with improvements thereon, *for* the White Mountain Apache Tribe of Arizona." Continuing, the Report states "the lands to be *restored* to the Tribe were originally part of the White Mountain Indian Reservation that was set aside as the Fort Apache military post in 1877." (S. Rep. No. 671, 86th Congress, 1st Session) (1959), R. L. 8.

Report No. 1284 (February 22, 1960) accompanying H.R. 8796, the companion Bill to S.2268, states that

> [T]he purpose of H.R. 8796, . . . is to provide that the United States holds in trust . . . land, together with improvements thereon, for the White Mountain Apache Tribe of Arizona. The bill explicitly provides *that the Tribe's beneficial ownership of the property* is subject to the right of the Secretary to use any part of the land and improvements for administrative or school purposes for so long as they are needed for those purposes.

R. L. 25.

Hearings on H.R. 8796, [S.2268] before the Subcommittee on Indian Affairs - Committee on Interior and Insular Affairs, February 11, 1960, make it clear that title to the school would *not* remain in the Secretary of Interior, that title would be maintained in full trust status with beneficial ownership in the Tribe with a limited right accorded to the Secretary of Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose. Of the 7,500 acres restored in trust to the Tribe, only 410 acres were used for the school site. R. L.12-24.



6. On November 18, 1965, the White Mountain Apache Tribal Council adopted a Resolution requesting the Secretary "to designate Fort Apache, including the military cemetery, as a national historic site." P. App., 39a.

7. On October 14, 1976, the United States National Park Service designated approximately 288 acres of the former Fort Apache military post and Theodore Roosevelt School, which included all of the buildings, as a National Historic Site to be known as the Fort Apache Historic District and placed it on the National Register of Historic Places. P. App., 4a, n.5, 39a, Complaint, para. 15.

8. In 1993, the Tribe adopted a Master Plan to protect, preserve, maintain, repair, rehabilitate and restore the Historic District as a cultural and economic resource for the Tribe and declared its intent to intervene and save its imperiled trust property. P. App., 4a, n.4.

9. In November 1998[6], the Tribe commissioned a professional engineering survey and assessment report to evaluate the condition of the buildings and lands held in trust for the Tribe. Based on this assessment, it was determined that the Tribe would have to expend $13,973,732 to bring the buildings and other improvements into compliance with the Secretary of Interior's own building code standards for historic buildings. P., 5, P. App., 4a.

10. Fort Apache "has become an increasingly significant tourist attraction" and the Tribe "has constructed a cultural museum within its boundaries." P. at 5, para. 1, Tribe C.A. Reply Br. 3.[7]

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6. The Government mistakenly states "1999" as the year of the assessment/survey. P. at 5, *see* P. App. 4a.

7. The subject land and improvements also had substantial value in 1960. *See* 1960 Senate Report No. 671, 2, *supra*, n.5, which valued the "lands to be donated," exclusive of improvements, at $141,000. The improvements were valued at $680,352. R. L.9.

11. On March 18, 1999, the Tribe filed a Complaint for money damages against the United States in the Court of Federal Claims. P. at 5, para. 2.

12. The Government states in pertinent part, that according to paras. 32 and 33 of the Tribe's Complaint, "the Government's asserted fiduciary duty stems from the 1960 Act." The Government fails to state that para. 32 alleges that it was the 1960 Act *and* the Government's subsequent use, occupation, management, supervision and administration of the Tribe's trust corpus that created a fiduciary duty in the Federal Government to maintain the Tribe's buildings and other site improvements comprising the trust corpus.[8] P., 5, para. 2 (Complaint, para. 32).

13. On June 1, 1999, the Government filed a motion to dismiss for failure to state a claim upon which relief may be granted and for lack of subject matter jurisdiction. The Government argued that neither the 1960 Act, nor any of the other statutes and regulations cited by the Tribe, imposed an obligation on the United States to maintain or restore the buildings held in trust for the Tribe, and that the Tribe had not stated a cognizable claim for money damages for the Government's alleged mismanagement of that trust property. P. App., 5a. The Court of Federal Claims agreed with the government and dismissed the complaint for failure to state a claim. *Id.*[9]

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8. The Complaint (at paras. 32-33) alleges that the government's fiduciary duty arises from the 1960 Act and other land-use statutes and regulations, but it is the 1960 Act *and* the Secretary's subsequent use and exclusive control of the Tribe's trust corpus for school or administrative purposes pursuant to the 1960 Act which the Tribe claims is the statutory source of the Government's fiduciary relationship and obligation to the Tribe.

9. The Judgment of November 19, 1999 was entered in the "United States Court of Federal Claims," not the "United States Court of Appeals for the Federal Circuit" as titled in P. App., 57a.



The court based its dismissal on its interpretation of *United States v. Mitchell*, 445 U.S. 535, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980) ("*Mitchell I*") and *United States v. Mitchell*, 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) ("*Mitchell II*"). It concluded that the 1960 Act only created a limited or bare trust relationship between the Government and the Tribe; that the 1960 Act was for the "benefit" of the Government, not that of the Tribe (P. App. 47a-48a); and that control of the subject trust property alone was insufficient to create a fiduciary relationship, because the 1960 Act did not require the Government to manage or operate the subject trust property for the Tribe's benefit. P. App., 51a-52a.

14. The Court of Appeals reversed and remanded. P. App., 1a-32a. The court concluded that the 1960 Act clearly created a trust. P. App., 10a-11a. It rejected the Government's argument that *Mitchell I* and *II*, read together, only impose a fiduciary obligation when the statute creating the trust relationship *also* directs the United States to manage the trust corpus for the benefit of the Native Americans. P. App., 14a. It then reviewed the application of the principles established by this Court in *Mitchell I* and *II* and their application to other statutory contexts, and concluded that "the language of *Mitchell II* makes quite clear that control alone is sufficient to create a fiduciary relationship." P. App., 14a-15a.[10] The court also noted that previously, in *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996), it had held that control alone was sufficient to

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10. Citing *Mitchell II*, 463 U.S. at 225, 103 S. Ct. 2961 (quoting *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 624 F.2d 981, 987 (Ct. Cl. 1980):

> [W]here the Federal Government takes on or has *control or supervision* over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

establish a fiduciary relationship under the facts of that case. P. App., 15a. The Court concluded that "to the extent that the government has actively used any part of the Tribe's trust property and where its "control over the buildings it occupies is essentially exclusive," those portions of the property so used "can no longer be classified as being held in merely a 'bare trust' under *Mitchell I*." (P. App., 17a, 31a). Thereafter, the Court of Appeals looked to the *Restatement (Second) of Trusts* to determine the nature of the Government's obligations. P. App., 18a.[11] The court rejected the Government's claim that the *Restatement (First) of the Law of Property* (1936) applied to the Tribe's claim. *Id.*, 27a, noting that the *Restatement of Property* states that it is not applicable to a trust situation; *Id.*, 27a. It also found that there was nothing contingent about the Tribe's future interest in the trust property, and that the Tribe's interest in the trust property, in any event, was better described as an indefeasibly vested future interest. The court found "the more nearly analogous provisions" to be Sections 134 and 187

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11. As this Court did in *Mitchell II*, *supra*, 463 U.S. at 226, 103 S. Ct. 2961. This is still the view of this Court:

> The existence of a trust obligation is not, of course, in question, *see United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707, 107 S. Ct. 1487, 94 L. Ed. 2d 704 (1987); *United States v. Mitchell*, 463 U.S. 206, 225, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983); *Seminole Nation v. United States*, 316 U.S. 286, 296-297, 62 S. Ct. 1049, 86 L. Ed. 1480 (1942). The fiduciary relationship has been described as "one of the primary cornerstones of Indian law," F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 221, and has been compared to one existing under a common law trust, with the United States as trustee, the Indian Tribe or individuals as beneficiaries, and the property and natural resources managed by the United States as the trust corpus. *See, e.g., Mitchell, supra*, at 225, 103 S. Ct. 2961.

*Department of Interior v. Klamath Water Users*, 121 S. Ct. 1060 at 1067 (2001).



of the *Restatement (First) of Property* (1936). *Id.*, 28a, and that, "Under these sections, a beneficiary has an immediate claim for money damages for any alleged failure to maintain and repair buildings." *Id.*, 28a-30a.[12]

## REASONS TO DENY THE GOVERNMENT'S PETITION FOR WRIT OF CERTIORARI

The Government's fiduciary obligation in this case is firmly anchored in the 1960 Act of Congress *and* the Government's subsequent use and control of the Tribe's trust property pursuant thereto.

The majority opinion below is consistent with controlling authority and this Court's jurisprudence with respect to the United States' fiduciary obligation to Indian Tribes. It does not constitute a deviation from *Mitchell I* or an *extension* of *Mitchell II*, nor does it represent "a significant doctrinal development in the Federal Circuit's own decisions" as claimed by the Government. P., 22, n.10.[13]

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12. Chief Judge Mayer filed a dissent, *Id.*, 33a-36a, as he did in *Brown*, *supra*, at 1565-1566. In *Brown*, Chief Judge Mayer disagreed that the leasing statutes and regulations at issue in that case amounted to "elaborate control" and that the allottees were "essentially powerless." *Id.*, at 1565-1566. He found the opposite in respect to the Secretary's [of Interior] control over rights of way and concluded that their only recourse was to hold the Government answerable to compensation. He did not reject the control test. In his dissent in this case, Chief Judge Mayer never reached the control issue because he concluded that the 1960 Act could not impose a fiduciary obligation on the Government, because the 1960 Act carved "out of the trust," the Government's right to use the Tribe's property, and therefore a fiduciary obligation would never attach during the Government's use and control. In his view, the Tribe's interest in the trust property was a "contingent future interest" only and there was no certainty it would ever vest. P. App., 35a.

13. The Government leads off its argument for certiorari by stating: "The Tribe itself recognized in the Court of Federal Claims 'that to hold the Government liable for money damages where the Government has

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### A. *The 1960 Act Declared a Present Indefeasible Trust*

The language of the 1960 Act, which is the starting point for all statutory interpretation, *Group Life and Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979); *Teamsters v. Daniel*, 439 U.S. 551, 558 (1979), explicitly created a "trust." The Court of Appeals below concluded that all of the necessary elements of a common law trust were present: a trustee (the United States), a beneficiary (the Tribe), and a trust corpus (the land and buildings held in trust). P. App., 11a. The court also noted that both the Tribe and the United States in their briefs agreed that the 1960 Act created a "trust." *Id.*, 10a[14]

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(Cont'd)

the right to use the trust property for its own purposes calls for an *extension* of *Mitchell II*." P., 10, P. App. 52a. The Government's reference is to the opinion of the U.S. Court of Federal Claims where that court states: "Plaintiff recognized at oral argument that to hold the Government liable for money damages where the Government has the right to use the trust property for its own purposes calls for an extension of *Mitchell II*."

The official reporter's transcript of the hearing on the Government's Motion to Dismiss, November 8, 1999, indicates no such statement by the Tribe. On page 29, line 22, Tribe's counsel did state: "Right. But this is a little bit different because this is a case of first impression. I admit that." (Tr., 11/8/99, p. 29). The Tribe's statement was in the context of generating income from the buildings and a damage claim for waste to *buildings held in trust* as opposed to the usual Indian trust property claims case for damages involving timber, minerals, gas, oil, or loss of Tribal water rights. The Tribe has consistently maintained in the Court of Federal Claims and in the Court of Appeals that the Tribe's claims fall squarely within the holding of *Mitchell I* and *II* and their progeny.

14. In note 7 of the Court of Appeals opinion, the court observed, "Inexplicably, at oral argument the Government reversed its position by arguing that a beneficial interest in the property had not yet passed to the Tribe, but for the reasons stated in the text, we find that the 1960 Act creates a 'trust.'" P. App. 10a, n.7.



The Government argues that the Tribe's interest in the subject land and buildings used by the Secretary is being held by the Secretary until such time as the Secretary transfers full beneficial title to the Tribe. This view is not supported by any authority and is contrary (1) to the plain meaning of the 1960 Act; (2) its legislative history which unequivocally declared, in the present tense, the lands and improvements in trust for the Tribe; (3) the canons of construction applicable to Congressional Acts regarding Indian Tribes and trust property; and (4) the understanding of the Tribe.[15]

The 1960 Act only reserved a limited use right to the Secretary. There was no "exception" in the 1960 Act declaring that the United States hold the land and improvements in trust for the Tribe. An "exception" operates upon the land description and withdraws the "excepted" property from the land description. A "reservation" of rights, on the other hand, is always of something taken back out of that which was clearly

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15. The Tribal Council was requested by the Department of the Interior, Bureau of Indian Affairs, "whether it would be willing to have the subject lands in a taxable status." Sept. 16, 1958, R. L. 4. The Tribal Council rejected this request on Sept. 24, 1958:

> The Tribe felt that inasmuch as the land was withdrawn from the reservation by Executive Order without compensation to the White Mountain Apache Tribe . . . that the land should be returned to the United States in trust for the White Mountain Apache Tribe in the same status as the entire balance of the reservation.

Sept. 24, 1958, Tribal Council Minutes. R. L. 5-7. The foregoing documents are part of the legislative history of the White Mountain Apache Tribal Council. They were not part of the record in the Court of Federal Claims or the Court of Appeals, but are relevant in determining the intent of the Grantor of the trust property, i.e., the United States, and the understanding of the Tribe as to the trust status of the land that was to be restored to the Tribe's reservation. *See* n.5, *supra*, and legislative history, R. L. 1-28.

granted, while an "exception" is of some part of the estate not granted at all.[16]

The 1960 Act reserved the limited use right of the Secretary "for as long as" the Secretary needed the Tribe's property for school or administrative purposes. By analogy to the law of property, words such as "so long as," "until," or "during" are appropriate to create a fee simple determinable. *Oldfield v. Stoew Homes, Inc.*, 26 N.J. 246, 139 A.2d 291, 296 (1958). The Secretary's need for the subject buildings is determinable and not perpetual as suggested by the Government. The Government has admitted that many of the subject buildings are no longer used or needed by the Secretary of Interior for school or administrative purposes.[17]

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16. *See, e.g., Moore v. Davis*, 273 Ky. 838, 117 S.W.2d 1033, 1035; *Houghtaling v. Stoothoff*, 170 Misc. 773, 12 N.Y.S.2d 207, 210; *Lewis v. Standard Oil Co. of California*, C.C.A.Cal., 88 F.2d 512, 514. (See other definitions and distinctions between "Exception" and "Reservation," *Black's Law Dictionary*, 4th Ed., 1951, at page 667-668.) The entire 7,579 acres and improvements thereon were restored to the Tribe and declared in full trust status to the White Mountain Apache Tribe on March 18, 1960, subject only to the reserved, but limited right of the Secretary to use any part of the included lands and improvements for administrative or school purposes. The 1960 Act did not "carve" out of the trust property the land and improvements to be used by the Secretary as that would not give the Secretary the desired "administrative flexibility" discussed in S. Report No. 671, R .L. 11.

17. "Between 1960 and March 18, 1999, the Government has used, controlled, supervised and managed these lands and the buildings located thereon for school or administrative purposes. Complaint, para. 13. *However, the Government no longer uses many of the buildings and improvements for school or administrative purposes.*" (Emphasis added.) Government's Mot. Dismiss at 5. Also noted by the Court of Appeals: "According to the parties, the Government has offered to terminate its trusteeship over an unspecified number of the buildings and to transfer control of them to the Tribe." P. App. 3a.



### B. *The 1960 Act Is for the Benefit of the Tribe–Not That Of the Government*

The Government argues that the 1960 Act was for the benefit of the government, not the Tribe. P., 15-16, citing P. App., 52a. This view is inconsistent with longstanding doctrines of Federal Indian law, and represents a dramatic departure from the *sui generis* trust relationship between the United States and Native American Tribes, and it is contrary to the legislative history of the 1960 Act.[18] Generally, the rules for construing federal statutes in Indian affairs provide for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited. *See* Cohen, *supra*, n.18 at 224-225.

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18. *See* R. L. 1-28. It is also inconsistent with the three general canons of construction applicable in Indian law: *First*, that treaties and other Federal action should when possible be read as protecting Indian rights and in a manner favorable to Indians, *See Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832); *Fox v. Morton*, 505 F.2d 254, 255 (9th Cir. 1974); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp 252, 256 (DDC 1973), *rev'd on other grounds*, 499 F.2d 1095 (D.C. Cir. 1974). *Second*. ambiguous expressions should be resolved in favor of Indians. *See, e.g., McClanhan v. State Tax Comm'n*, 411 U.S. 164, 175 (1973); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *Ute Indian Tribe v. Utah*, 521 F. Supp 1072, 1110-32 (D. Utah 1981), *rev'd on other grounds*, 716 F.2d 1298 (10th Cir. 1983). *Third*, treaties should be construed as the Indians would have understood them. *See, e.g., Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 116 (1938). These rules of construction are not limited to treaties. The policy of the rules is rooted in the trust relationship between the United States and Indian tribes. *See* F. Cohen, *Federal Indian Law (2.ed)* note 4, at 221-225. Moreover, the term "trust" has a clear meaning in statutes or acts benefitting Indians. A court must give meaning to every word of a statute. 2A Sutherland, Statutory Construction 63 (C. Sans. 4 ed. 1972) cited in *White Mountain Apache Tribe of Arizona v. United States*, 11 Cl. Ct. 614, 643 (1987).

Since Congress is exercising a trust responsibility in its enactment of Indian statutes [such as the 1960 Act], courts presume that Congress's intent toward the Indians is benevolent.[19] Accordingly, courts construe statutes affecting Indians as non-abrogation of prior Indian rights or, in case of ambiguity, in a manner favorable to the Indians. *See United States v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941). This Court has observed that where Congress is exercising its authority over Indians, the trust obligation would appear to require that its statutes must be based on a determination that the protection of the Indians will be served; otherwise, a statute would not be rationally related to the trusteeship obligation to Indians. F. Cohen, *supra*, n.18, 221. Further, although Congress can unilaterally act in a fashion adverse to Indian interests, such an intent must be "clear," "plain," or "manifest" in the language or legislative history of an enactment. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *United States v. Creek Nation*, 295 U.S. 103 (1935) (Held: Unless Congress has expressly directed otherwise, the Federal Executive is held to a strict standard of compliance for fiduciary duties.) *See* F. Cohen, *supra*, 225-228.

19. "[T]here is a presumption that absent explicit language to the contrary, all funds held by the United States for Indian tribes are held in trust." *Rogers v. United States*, 697 F.2d 886, 890 (9th Cir. 1983); *United States v. Mitchell*, 463 U.S. 206, 225, 103 S. Ct. 2961, 2972 (1983); This obligation derives from "a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of [the Supreme] Court under which the Government has charged itself with moral obligations of the highest responsibility and trust" in carrying out its treaty obligations with the Indian tribes. *Seminole Nation v. United States*, 316 U.S. 286, 296-97, 62 S. Ct. 1049, 1054-55, (1942) (footnote omitted).

*Loudner v. United States*, 108 F.3d 896, 900 (8th Cir. 1997); *Moose v. United States*, 674 F.2d 1277 at 1281 (9th Cir. 1982), citing *Navajo Tribe v. United States*, 224 Ct. Cl. 171, 624 F.2d 981, 987 (Ct. Cl. 1980) n.10.



In this case, the United States held the Fort Apache lands and improvements from 1877 to 1960 in *fee simple absolute*. During that interim there was no obligation on the part of the United States to preserve the land and property for the benefit of the White Mountain Apache Tribe. However, after the 1960 Act restored the land and improvements to the Tribe, the United States was left with naked title, and full beneficial title to the entire 7,579 acres and improvements thereon, was declared held in trust by the United States for the Tribe, subject only to a limited use by the Secretary of the Interior for specific, determinable purposes.[20] Once the Government commenced to control and use the Tribe's trust corpus as authorized by the 1960 Act, it became an *in situs* trustee with distinct fiduciary obligations to the Tribe's trust corpus.

If the United States Congress intended to exempt the United States from any fiduciary obligation in respect to the Tribe property, it could have provided in the 1960 Act that during the Secretary's use of the Tribe's trust property for school and

20. The title to the Tribe created by the 1960 Act of Congress is "as sacred as the fee simple title of the whites." F. Cohen, *Handbook of Federal Indian Law* (1982 ed.), Ch. 9, Sec. A, 472, n.11, *Mitchel v. United States*, 34 U.S. (9 Peters), 711, 746 (1835). The United States' trust title is characterized as "naked fee", with the full beneficial interest vested in the Tribes. *See United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 116 (1938); in that case the Court made clear that the Indian right of occupancy includes ownership of the timber and minerals upon the land, stating: "[T]he [Indians'] right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee." 304 U.S. at 116-18; *see also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 n.12 (1980). *See also United States v. West*, 232 F.2d 694 (9th Cir.), *cert. denied*, 352 U.S. 834, 77 S. Ct. 51 (1956). (Held: "the White Mountain Apaches have the usual Indian right of occupancy with the fee in the United States [that is] as sacred as the fee-simple of the whites.") Likewise, and as *explicitly* stated in the 1960 Act, the White Mountain Apache Tribe has all right, title and interest to the land and improvements thereon, regardless of the Secretary's limited right to use them for specifically authorized, but limited, determinable purposes.

administrative purposes, the Secretary would not be obligated to maintain, repair and preserve the property it was using. Alternatively, the 1960 Act could have been drafted to exclude or except the buildings being used by the Secretary from the declaration of Trust and they would have remained titled as Federal government buildings. Congress did none of the foregoing. The Government offers no authority to support its benefit-for-government argument other than its subjective interpretation of the 1960 Act and the Court of Federal Claims' misapplication of the *Restatement of Property* to the 1960 Act.

### C. *The 1960 Act Authorizes More than a "Bare" Trust; It Authorized Exclusive Control by the Secretary of Interior of the Tribe's Property*

The Government contends that the 1960 Act only created a "bare trust" like the trust created by the General Allotment Act discussed in *United States v. Mitchell*, 445 U.S. 535 (1980) at 542, 100 S. Ct. 1349 (*Mitchell I*). P., 15.[21] The Government ignores the complete control that the 1960 Act authorized, but did not require the Secretary to exercise, over the Tribe's trust property. The Government further argues that because the 1960 Act does not "clearly obligate" the Government to manage the Fort Apache site for the purpose of protecting the Tribe's financial interest, it does not meet the requirements of *Mitchell II*. P., 17, P. App. 50a. In the Government's view, the only proper

21. The 1960 Act declared the land, buildings and improvements held in trust for the White Mountain Apache Tribe. However, the 1960 Act went well beyond the General Allottment Act's limited or bare trust pronouncement, because it authorized a limited right in the Federal Government, if it chose to exercise that right, to control the Tribe's trust property for school or administrative purposes. When the Federal Government chose to undertake comprehensive control to use the Tribe's property after it was declared in trust, it moved itself into a fiduciary relationship in respect to the Tribe's property within the holding of *United States v. Mitchell* (II), 463 U.S. 206, 225, 103 S. Ct. 2961, 2972 (1983); *White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 620, 649-650 (1987); and *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183; 624 F.2d 98, 987 (Ct. Cl. 1980).



*Mitchell II* inquiry is one that is directed to "the nature of control" and not the "extent" of the control and that "nature of control" means an obligation to generate revenue from the Tribe's trust property, not to protect it from loss or waste.

The Government is in error, and veers sharply from overwhelming authority to the contrary, when it argues for an overly restrictive interpretation of *Mitchell II* that narrowly defines "benefit" to mean that the 1960 Act would have to obligate the Government to generate revenue from the subject land and buildings for the Tribe's benefit, while the Government was controlling them for school or administrative purposes, to state a money mandating claim.[22] The Tribe has never argued that the Government had an obligation to generate revenue for the Tribe during the Secretary's control and use of the Tribe's trust property. It claims, however, that the Secretary has a fiduciary obligation to maintain, repair and preserve the Tribe's trust property it is using and controlling.

The Government's "nature of control" argument mistakenly merges "management for the benefit of Indians" with the dispositive "control" criteria approved in *Mitchell II*, *supra*, *White Mountain Apache Tribe of Arizona v. United States*, 11 Cl. Ct. 614, 620 (1987), and *Navajo Tribe of Indians v. United States*, 224 Cl. Ct. 171, 183, 624 F.2d 981, 987 (1980), cited

22. In *Mitchell II*, this Court's acknowledgment of a general trust responsibility and of rules of construction applicable to Indian law indicates that detailed delineation of management duties are not required. This Court recognized elaborate control by the Government over Indian property as an independent basis for its finding of a fiduciary duty. *Mitchell II*, at 224, 103 S. Ct. at 2972. *See also Duncan v. United States*, 667 F.2d 36, 42-43 (Ct. Cl. 1980), *cert. denied*, 103 S. Ct. 3569 (1983) (Federal trust need not spell out all duties of the Government due to the history of the Governmental fiduciary obligation in management of Indian property — broad scale Congressional establishment of trust is enough). The *Duncan* Court aptly noted '[It] is difficult to see why Congress should have to do more to create an Indian trust than a private settlor would have to do to establish a private trust.' *Duncan*, at 43 n. 10.

with approval by this Court in *Mitchell II* at 224, S. Ct. at 2972.[23] It is emphasized that this Court [in *Mitchell II*] found that it was not significant that the statutes and regulations did not mention that the United States could be held financially responsible for damages to the Indians resulting from the United States' management decisions and that it was enough that the statutes and regulations created a fiduciary responsibility. *Mitchell II* at 226, 103 S. Ct. at 2972. *See Brown v. United States*, 86 F.3d 1554, 1539 n.6 (1996). (Trial court appeared to have misapplied *Mitchell II* transforming "the descriptive into the prescriptive.")

The Government refuses to move itself outside of the first prong of the *Mitchell II* "management test" which looks to the existence of a "comprehensive" scheme of regulation and statutory responsibility to discern the existence of a trust relationship sufficient for the Claims Court to have jurisdiction.

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23. Other Federal Claims Court and Federal Circuit decisions have recognized a breach of fiduciary duty based on the Government's action once it has undertaken action within the exercise of only general powers over Indian affairs to control or supervise Indian property for the benefit of a Tribe even though no statutory or regulatory scheme required the Government to generate income for the Tribe from the particular Tribal resource or property at issue. *See White Mountain Apache Tribe of Arizona v. United States*, 11 Cl. Ct. 614, 620 (1987) citing *Navajo Tribe of Indians v. United States*, *id.*; *Gila River Pima Maricopa Indian Community v. United States*, 231 Cl. Ct. 193, 208, 684 F.2d 852, 861 (1982) (Per curiam) (held: although the Government had no statutory or regulatory duty to develop irrigation facilities on the Reservation, failure to protect water resources can be actionable). The reasoning of the Court in *Mitchell II*, and by the Court of Appeals in this case, recognizing elaborate control by the Government over Indian property as an independent basis for finding of a fiduciary duty, makes complete sense; as most statutory schemes in Indian affairs are not as detailed as the timber management statutes and regulations in *Mitchell II*, and most statutes that regulate Indian affairs do not delineate specific management duties or provide for money damages for mismanagement.



The second prong of the *Mitchell* case, the control test, in contrast, has no such qualifiers.[24] *Brown v. United States*, *supra*, at 1561. The Court of Appeals in *Brown* found error when the Claims Court in that case imposed a more restrictive test than was established in *Mitchell II*, noting: "The Supreme Court did not qualify 'control or supervision' with modifiers such as 'significant,' 'comprehensive,' 'pervasive,' or 'elaborate.' Nor did the Court anywhere suggest that the assumption of either control or supervision alone was insufficient to give rise to an enforceable fiduciary duty." *Brown*, *supra*, 1561.

In *Brown*, the Government argued that regardless of the Secretary's *control* over commercial leasing, *Mitchell I* and *Mitchell II*, required that the Government pursue an *active role* in the management of trust property to be liable for damages. *Id.* at 1561, n.9.

The Court of Appeals disagreed and found that the formulations presented by the Government shared two fundamental flaws: "First, they improperly transform the disjunctive 'control *or* supervision' test into a conjunctive 'control *and* supervision' test. Second, they qualify the 'supervision' aspect of the test by heaping on modifiers such as 'rather intense' and 'extensive' . . . ." *Id.* at 1561 n.9.

Oblivious to the control prong of the *Mitchell II* criteria, the Government argues in this case that the Court of Appeals has bolted from the *Mitchell II* "money mandating duty" inquiry, which, in its view, must "spring" from the statutes and regulations which "define the contours of the United States'

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24. A review of the "comprehensive scheme of regulation" cases and "control" cases indicates that they ultimately merge at the same point — a determination of sufficient Government control to establish a fiduciary obligation on the part of the United States to conduct itself as a reasonable trustee in respect to the trust corpus it controls. The Government errs, however, by taking the "description" of a comprehensive regulatory scheme as an end in itself, a "prescription," *sine qua non*, for a damage claim, thereby losing sight of the central inquiry under *Mitchell I* and *II*.

fiduciary responsibilities."[25] P., 22 n.10. The Government further charges the Court of Appeals with divorcing the immunity inquiry from the terms of the pertinent statutes and regulations and embracing instead, judge-made law and notions of Federal control over trust property.[26] P. at 23, n.10.

In the case at bar, the Government, as it argued in *Brown*, *supra*, would have the Supreme Court raise the jurisdictional threshold above the level where this Court has already squarely placed it. *Brown*, *supra*, at 1561.[27] Likewise, the Court of

25. Cf. This Court quoted with approval from the Court of Claims opinion in *Navajo Tribe v. United States*, as follows:

> [W]here the federal government takes on or has *control or supervision over Tribal monies or properties*, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

*Mitchell II*, at 225, 1035 S. Ct. at 2972 (emphasis added) (quoting *Navajo Tribe v. United States*, 224 Ct. Cl. 171, 624 F.2d 981, 987 (1980)). In this case, the Court of Appeals determined that the Government's fiduciary obligation "springs" from the 1960 Act which authorized the Secretary's subsequent control and use of the Tribe's trust property.

26. The Court of Appeals looked to the applicable source of the substantive law which may grant the right to recovery either "*expressly or by implication*." *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 599, 372 F.2d 1002, 1007 (1967). It is clear that the 1960 Act *and subsequent control* by the Government of the Tribe's trust corpus is a source of substantive law that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." See *Mitchell II*, 463 U.S. at 217, 103 S. Ct. 2961 quoting *United States v. Testan*, 424 U.S. 392, at 400, 96 S. Ct. at 954 (quoting *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 599, 372 F.2d 1002, 1007 (1967); *see Brown v. United States*, *supra*, 86 F.3d 1554, discussing "the Mitchell Decisions" at 1559.

27. In *Brown*, the Court of Appeals observed that this Court's "alternative test of 'control or supervision' makes eminent good sense (Cont'd)



Appeals in this case correctly found that if the Tribe controlled the land and buildings at issue in this case, the duty of the United States would be lessened appropriately. *White Mountain Apache*, P. App. 18a; in accord, *Navajo Nation*, 263 F.3d 1325 at 1329 (Fed. Cir. 2001); *Cherokee Nation v. United States*, 21 Cl. Ct. 565, 573-574 (1990).[28]

The Court of Appeals in this case concluded that the record was unclear as to the extent of the Government's control and use of the many buildings and grounds comprising Fort Apache, that there might be related issues involving application of the

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as well." That "if the Secretary controls leasing, that he or she does not also supervise or manage it should not matter." Thus, the Court concluded at 1560, "Under *Mitchell II*, then, as properly (and literally) construed, the assumption by Congress and/or the Secretary, its delegatee, of control of allottee money or property beyond the limited trust embodied in the General Allotment Act imposes on the government a fiduciary duty to the allottees." *See also White Mountain Apache*, P. App., 17a.

28. The control exercised by the Government in the case at bar pursuant to the 1960 Act far exceeds the Government's control which gave rise to a fiduciary obligation on the part of the Government in *Brown*, *supra*. However, the Government steadfastly maintains that control is irrelevant unless the Government is also obligated to generate revenue from the Tribe's property. But see Tribe's discussion, Part D, *infra*, on waste or loss of value to Tribal trust property as a breach of the United States' fiduciary obligation. In *Mitchell II*, this Court looked beyond the particular source of law, which was silent regarding damages and found an *implicit* or inherent requirement of compensation for breach of fiduciary duty by looking to the common law of trusts. *Mitchell II* at 226, 103 S. Ct. at 2973. *See also e.g.*, *American Indians Residing on the Maricopa Ak-Chin Reservation v. United States*, 667 F.2d 980, 990 (Ct. Cl. 1981) (trustee liability for breach of fiduciary duty *inherent* in trust relationship; damages are appropriate remedy for breach), *cert. denied*, 456 U.S. 989 (1982); *Whiskers v. United States*, 600 F.2d 1331, 1335 (Ct. Cl. 1979), *cert. denied*, 444 U.S. 1078 (1980); *Coast Indian Community v. United States*, 550 F.2d 639, 653 (Ct. Cl. 1979); *Cheyenne-Arapaho Tribes of Indians v. United States*, 512 F.2d 1390, 1392-94 (Ct. Cl. 1975).

statute of limitations, exclusivity of control, and duration of use, all of which the Court of Federal Claims would have to resolve upon remand. P. App. 31a-32a.

The Government, however, criticizes the Court of Appeals' remand instruction to the Court of Federal Claims to determine, *inter alia*: (1) the extent of the Government's active use and control over the subject trust property; (2) whether the Government's control was essentially exclusive; and (3) the extent to which the Government, not the Tribe, had control over the Tribe's trust corpus. P., 21, para. 4.

The Government describes such an inquiry as "highly amorphous," *Id.* at 22, and that there is no evidence on the face of the 1960 Act that Congress intended to "expose the United States to mandatory liability in that haphazard manner." *Id.* at 22. However, the same type inquiry was condoned by this Court in *Mitchell I* which remanded that case to the Claims Court for a determination of whether the plaintiffs' right to recover money damages for Government mismanagement of timber resources could be found in some source other than the General Allotment Act. Moreover, such an inquiry is unavoidable if a court is to properly and diligently determine if a fiduciary relationship and obligation exists, the breach of which is remediable in damages. Virtually every Indian Tucker Act claim since *Mitchell II* has undergone the same type of judicial inquiry.

### D. *The Federal Government's Action to Undertake Control, Use and Occupation of the Tribe's Property After the 1960 Act created a Fiduciary Obligation in the Government to Protect the Tribe's Financial Interests in the Subject Property from Waste or Loss*

The proscription against the Federal Government committing waste, destruction, or loss to the value of Indian property under its control is a well-established principle in



Federal Indian law and policy and may be the basis for a money-mandating claim as expressed by the Supreme Court in *Mitchell II*,

> [W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection. *Navajo Tribe of Indians v. United States*, 224 Ct. Cl., 171, 183, 624 F.2d 981,987 (1980).

*Id.* at 225, 103 S. Ct. at 2972.[29]

29. *See also Pyramid Lake Paiute Tribe of Indians v. United States Dep't. of the Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990) (finding duty to protect fishery in reservation lake); *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 425-26 (1991) (finding duty to protect reservation water rights); *White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 672 (1987) (finding duty to protect Indian forest lands), *aff'd*, 5 F.3d 1506 (Fed. Cir.), *cert. denied*, 114 S. Ct. 1538 (1993); *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 750 (10th Cir. 1987) (finding trust responsibility to protect wildlife resources); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C.) (1973) (finding duty to protect water resources), *modified on other grounds*, 360 F. Supp. 669 (D.D.C. 1973), rev'd in part on other grounds, 499 F.2d 1095 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *Mitchell v. United States*, 10 Cl. Ct. 787, 788 (1980) (Held: Bureau of Indian Affairs has continuing duty to replant harvested areas.)

*Restatement (Second) of Trusts* § 176 (1959) ("The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property"); 2A Austin W. Scott & William F. Fratcher, the Law of Trusts § 176 (Trustees liable for failure to avert or mitigate damages); American Indian and the Federal–Indian Relationship; Including Treaty Review 179 (Comm. Print 1976) [hereinafter Trust Report] (applying

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Federal courts have also consistently emphasized that Federal agencies must deal with Tribes according to the "most exacting fiduciary standards"[30] and that the Bureau of Indian Affairs (BIA), in particular, has a special trust responsibility beyond those of other Federal agencies, because it is responsible for managing Tribal lands and resources as the principal agent of the Trustee, United States.[31]

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trust principles to Government's role in protecting Indian land; *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 426 (1991).

> Where a trust relationship exists, [t]he trustee has a duty to protect the trust property against damage or destruction. He is obligated to the beneficiary to do all acts necessary for the preservation of the trust *res* which would be performed by a reasonably prudent man employing his own like property for purposes similar to those of the trust.

Citing G. Bogert, *The Law of Trusts & Trustees* § 582 (2d ed. Revised 1980); and *Restatement (Second) of Trusts*, § 176 (1959) *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 426 (1991); *White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 681, *aff'd*, 5 F.3d 1506 (Fed. Cir. 1987), *cert. denied*, 114 S. Ct. 1538 (1993) (government breached fiduciary duty by overcutting tribal forest lands and overgrazing tribal grazing lands).

30. *Seminole Nation v. United States*, 316 U.S. 286 at 297 (1942); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 at 256 (D.D.C. 1973); Decisions of the Court of Claims have uniformly held that the standards of a private fiduciary must be adhered to by executive officials administering Indian property. *E.g.*, *Coast Indian Community v. United States*, 213 Ct. Cl. 129, 550 F.2d 639 (1977); *Cheyenne-Arapaho Tribes v. United States*, 206 Ct. Cl. 10, 18-19 (1944); *Navajo Tribe v. United States*, 364 F.2d 320, 322-324 (Ct. Cl. 1966).

31. *Pyramid Lake Paiute Tribe of Indians v. United States Dep't. of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990); *See also* BRUCE BABBITT, U.S. DEPARTMENT OF INTERIOR, ORDER NO. 3175, INCORPORATED INTO DEPARTMENTAL RESPONSIBILITIES FOR INDIAN TRUST RESOURCES (November 8, 1993), hereinafter (Cont'd)



In Tribal resource cases involving the Government's liability for breach of fiduciary obligation with respect to oil, gas, or commercial leases, *i.e.*, *Pawnee v. United States*, 830 F.2d 187 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); *Brown v. United States*, 86 F.3d 1554, 1558-1562 (Fed. Cir. 1996); *Jicarrilla Apache Tribe v. Supron Energy Corporation*, 782 F.2d 855, 857 (10th Cir. 1985), *cert. denied*, 479 U.S. 970 (1986), the Federal courts have made inquiry of the Government's control over the trust assets or resources involved to determine whether there was *sufficient control* by the Government to give rise to a fiduciary obligation under this Court's decision in *Mitchell II*, *supra*.

In other cases, following *Mitchell II*, the Federal Circuit Court of Appeals has found "elaborate control" over a timber resource as an alternative, if *not* the primary, reason for imposing a fiduciary obligation. *Short v. United States*, 719 F. 2d 1133, 1135-36, Fed. Cir. (1983), *cert. denied*, 467 U.S. 1256 (1984), and in the government's role in regulating mineral leasing, *Jicarrilla Apache Tribe v. Supron Energy Corporation*, 782 F. 2d 855, 857, 10th Cir., *cert. denied*, 479 U.S. 970 (1986); *Pawnee v. United States*, 830 F. 2d 187, 189-90 F. Cir. (1987), *cert. denied*, 486 U.S. 1032 (1988) (finding federal government owes fiduciary obligation to Indians for administration, collection and payment of royalties under oil and gas leases). *See Fort Mohave Indian Tribe v. United States*, 23 Cl. Ct. 417, 425-426 (1991) (federal government, once it took control of

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INTERIOR ORDER; *Navajo Tribe v. United States*, 364 F.2d 320, Ct. Cl. (1966); *See generally United States v. Winnebago Tribe*, 542 F.2d 1002 (8th Cir. 1976); *Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (Ruiz may impose more extensive procedural requirements on the Bureau of Indian Affairs than are customary for federal agencies. *See* Davis, Administrative Law Surprises in the Ruiz Case, 75 COLUM. L. REV. 823 (1975) cited with approval in *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) at 1100. *See also* F. Cohen, *Handbook of Federal Indian Law*, *supra*, pp. 225-228.

litigation for protection of Tribe's water resources, was obligated to do so in a fiduciary capacity).[32]

### E. *The Court of Appeals Decision Does Not Increase the Government's Liability Beyond This Court's Holding in Mitchell II*

The Government attempts to grab the attention of this Court with alarmist predictions that the Court of Appeals decision will encourage the filing of additional damage claims against the United States for breach of trust with respect to Indian trust property or buildings on such property, and ties its dire prediction to the fact that the United States holds more than 56 million acres of land in trust, for individual Indians or Indian Tribes. P., 23. The Government argues that because a significant portion of that land, including allotments, is held in a limited or bare trust, the Court of Appeals decision "could prompt money damages claims for breach of trust with respect to such property, even though such claims would otherwise be barred under a proper understanding of this Court's *Mitchell* decisions." *Id.*, 23-24. The Government evokes a cellulose metaphor as it portrays the Court of Appeals opinion as "taking root" and

32. In *White Mountain Apache Tribe of Arizona v. United States*, 11 Cl. Ct. 614 (1987), Judge Netteshiem found that the transfer of the Tribe's forest to the adjacent national forests between 1909 - 1912 by the federal government to protect the watershed to the Salt River Federal Reclamation Project represented an instance of mismanagement by the federal government. The court further found that the reigning conservationist theory — protection of the forest to protect watershed in the arid southwest did not excuse annexation of the Tribe's forest as the reservation's forest was the Tribe's resource, not the Nation's. *Id.* at 670. Likewise, in the case at bar, no purported "benefit" to the federal government or to the Tribe stemming from the Government's use of the subject trust property excuses the waste and destruction committed by the Government to the Tribe's property while under its daily control and use.



laments "the rapid speed with which it already has spread." P. App. 25.[33]

In that vein, the Government points to *Navajo Nation v. United States*, 263 F.3d 1325, 1329-1330, 1335 and *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 51 Fed. Cl. 60, 68 (2001), as proof that the "broad reasoning" of the Court of Appeals decision "already has spilled over into other types of Indian breach-of-trust litigation." Petition 24-25.

In *Navajo*, *supra*, 1329, the Court of Appeals' reference to *White Mountain Apache*, 249 F.3d at 1377, merely noted that a statute [the 1960 Act] established an "enforceable fiduciary relationship between the United States and the Tribe," *id.* at 1383, and that although the statute was silent on *how* the United States was to administer the property, the Court applied the common law of trusts to find a duty on the part of the United States to preserve the Tribe's trust corpus, *Navajo* at 1330. This is hardly a new concept and comports with this Court's application of the law of trusts in *Mitchell II* once a full fiduciary relationship was determined to exist in that case. The Court of Appeals opinion in *Navajo*, *supra*, did *not* assume, as the Government seems to imply, that the Court of Appeals in *White Mountain Apache* applied the law of trusts *in the absence of any statutory source* to establish the required fiduciary relationship, and clearly understood that the majority in *White Mountain Apache* looked to the 1960 Act as the statutory source to which it applied the *Mitchell I* and *II* criteria, *supra*, at 1329-1330.[34]

33. The Government also contends that the Court of Appeals decision below conflicts with this Court's sovereign immunity jurisprudence (P., 21), citing *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991), a case involving the State of Missouri's mandatory retirement requirement for judges, the Age Discrimination in Employment Act (ADEA) and the application of the Tenth Amendment. *Gregory* has no apparent application to this case.

34. The Court of Federal Claims in *Shoshone*, *supra*, at 68, obviously understood the *White Mountain Apache* opinion to mean that there was a *fiduciary obligation* on the part of the Government to preserve

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When the Secretary chose to exercise its statutory, but limited, right to use and control the Tribe's trust property to the exclusion of the Tribe for school or administrative purposes, that use and control gave rise to a fiduciary obligation on the part of the Government to maintain and repair the Tribe's trust property. There is no doctrine in American Indian law which allows the United States, short of a condemnation action, to take and use Indian trust property and then transfer the property back to the Tribe in a totally wasted state. Yet, that is what the Government would have this Court approve.[35] As this Court aptly observed in *Mitchell II*, *supra* at 207: "it would be anomalous to conclude that these enactments create a right to the value of certain resources when the Secretary lives up to his duties, but no right to the value of the resources if the Secretary's duties are not performed," 463 U.S. 206, 207.

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the trust corpus under its control, even though no statute or regulation specifically required the Government to preserve it. The 1960 Act and subsequent control by the Government created the *fiduciary relationship* which gave rise to the *fiduciary obligation*.

35. During oral argument below in the Court of Appeals, December 7, 2000, the court inquired what the Government's position would be if "the United States tomorrow dynamited to the ground all 36 buildings," to which the Government replied,

> I do believe that the United States has no special obligation to the Tribe with regard to any building needed for the operation of the school and therefore subject to the reservation in the 1960 statute. So, therefore, if it were deemed appropriate to dynamite those buildings to the ground by the Secretary of the Interior, it would be within the Secretary's discretion to do so.

In response to the court's inquiry whether the Tribe had any property right that was impaired by that destruction, the Government replied: "I don't believe so, Your Honor. I believe that beneficial title has not even passed as to any of those portions of the site that are retained for exclusive use by the United States." (Tr., December 7, 2000, p. 23).



Authorization in the 1960 Act for the Secretary to use and control the Tribe's trust property for limited school or administrative purposes does not include the right of the Government to appropriate the Tribe's buildings and destroy them without rendering or assuming an obligation to render just compensation.[36] As this Court observed in *United States v. Sioux Nation*, 448 U.S. 371, 406, 100 S. Ct. 2716, 2736 (1980), "In *Shoshone Tribe*, Mr. Justice Cardozo, in speaking for the Court, expressed the distinction between the conflicting principles in a characteristic pithy phrase: 'Spoiliation is not management'"[37]

In bright contrast to the Government's extreme view of the Government's trust obligation, *supra*, the Court of Appeals' opinion comes squarely within the criteria established by this Court in *Mitchell I* and *II* for finding a fiduciary relationship and obligation, the breach of which by the Federal Government could reasonably be interpreted as mandating compensation by the Government for damages sustained as a result of the breach.

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36. *Shoshone Tribe v. United States*, 299 U.S. 476, 57 S. Ct. 244 (1937). In *Shoshone*, the Court conceded Congress' paramount property over Indian property, but held, nonetheless, that "[t]he power does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes without rendering, or assuming an obligation to render, just compensation.'" *Id.* at 497, 57 S. Ct. at 252 (quoting *United States v. Creek Nation*, 295 U.S. 103, 110, 55 S. Ct. 681, 684 (1935). *See also White Mountain Apache Tribe of Arizona v. United States*, 11 Cl. Ct. 614, 670 (1987; discussion of, *supra*, n.32.

37. Quoting Justice Cardozo, in *Shoshone*, 299 U.S. at 498, 57 S. Ct. at 253 (1937).

## CONCLUSION

This case does not merit further review by this Court. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 5 2002

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No. 01-1067

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

WHITE MOUNTAIN APACHE TRIBE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

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## REPLY BRIEF FOR THE PETITIONER

In its brief in opposition, respondent White Mountain Apache Tribe (Tribe) devotes its efforts to defending the ruling of the divided court of appeals below that the United States is accountable in money damages for the alleged mismanagement of property placed in trust by the 1960 Act, even though that Act does not obligate the government to manage the property for the benefit of the Tribe and, instead, reserves to the *government* the right to use the property for its *own* purposes. The decision below directly contravenes this Court's *Mitchell* decisions,[1] as well as the bedrock sovereign-immunity principles on which those decisions are founded. The Court should grant certiorari and provide needed guidance on when the United States may be liable in damages for breach of an alleged trust responsibility owed to an Indian Tribe.

1. The Tribe's characterization of the 1960 Act (see Br. in Opp. 11-16) is contradicted by the Act's own terms. While

[1] *United States* v. *Mitchell* (*Mitchell I*), 445 U.S. 535 (1980); *United States* v. *Mitchell* (*Mitchell II*), 463 U.S. 206 (1983); see Pet. 11-13.

the Act "declare[s]" the property at issue "to be held by the United States in trust for the White Mountain Apache Tribe," it states that such declaration is "*subject to* the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." 74 Stat. 8 (emphasis added). Thus, whatever interest the Tribe has in the trust property, that interest is subordinate to the government's right to use the property for governmental purposes.[2] The Tribe asserts (Br. in Opp. 12) "that many of the subject buildings are no longer used or needed by the Secretary of Interior for school or administrative purposes." The court of appeals' decision in this case, however, is based on the understanding that the government *does* "use such trust property for its own purposes" (Pet. App. 17a) and, indeed, the government still operates an Indian boarding school on the site. *Id.* at 3a.

The Tribe argues (Br. in Opp. 13 (heading)) that the 1960 Act "is for the benefit of the Tribe." As the court of appeals recognized, however, "[i]t is undisputed that the 1960 Act contains no * * * requirement" that the United States "manage the trust corpus for the benefit of the beneficiaries, *i.e.*, the Native Americans." Pet. App. 14a. Both Chief Judge Mayer and the Court of Federal Claims reached the same conclusion. See *id.* at 33a-34a ("Nothing in the 1960 Act imposes a fiduciary responsibility to manage the fort for the benefit of the Tribe and, in fact, it specifically carves the government's right to unrestricted use for the specified purposes out of the trust.") (Chief Judge Mayer); *id.* at 48a ("As the plain language indicates, the Act reserves the Fort Apache site for the federal government's benefit and not for

[2] The Tribe characterizes (at 10) the nature of its interest in the property at issue as a "present indefeasible" interest. As explained in the petition (at 21 & n.9), that characterization is incorrect and, more to the point, does not bear on the basic question presented by this case.



the benefit of the Tribe.") (Court of Federal Claims). None of the general Indian canons of statutory construction on which the Tribe now relies (Br. in Opp. 13) can alter, or override, the plain terms of the Act. See, *e.g.*, *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986). Moreover, respondent's invocation of those canons to claim a property interest, in derogation of the express statutory reservation to the United States of the right to use both the land and the improvements for its own governmental purposes is contrary to the established canon of construction that "land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983).

Many of the buildings or structures on the Fort Apache site are more than a century old. Pet. 3-4. There is no evidence that in enacting the 1960 Act, Congress intended to impose on the Secretary of the Interior a duty to undertake historic preservation efforts at Fort Apache, and certainly no evidence that Congress intended to assume a duty on the part of the United States to preserve the fort in the state necessary to promote the Tribe's own "tourism-based economy." Br. in. Opp. 2 n.2.

2. The Tribe argues that its damages claim "fall[s] squarely within the holding of *Mitchell I* and *II*." Br. in Opp. 10 n.13; see *id.* at 9, 29. As explained in the petition (at 14-22), that contention—which divided the courts below, compare Pet. App. 26a (panel majority), with *id.* at 33a-34a (Chief Judge Mayer) and *id.* at 47a-48a (Court of Federal Claims)—cannot be reconciled with this Court's decisions.

a. The conflict between the decision below and *Mitchell I* is particularly stark. In *Mitchell I*, the Court rejected the argument that the General Allotment Act supports a damages action against the United States for mismanagement of timber on allotted lands. The Court explained that the Act

"does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands" and, instead, creates "only a limited trust relationship between the United States and the [Tribe]." 445 U.S. at 542. The Court reached that conclusion even though, as it pointed out, the General Allotment Act explicitly obligates the United States to hold land "'in trust for *the sole use and benefit of the Indian* to whom such allotment shall have been made.'" *Id.* at 541 (emphasis added). If, as *Mitchell I* held, that provision does not give rise to a duty on the part of the United States with respect to the management of the trust property that is enforceable in a suit for money damages, then it follows *a fortiori* that the 1960 Act—which expressly reserves to the government the right to use the trust property for governmental purposes—does not give rise to such a duty with respect to the management of the trust property.

b. In *Mitchell II*, the Court concluded that a different set of statutes and regulations *did* give rise to a money-mandating duty on the part of the United States with respect to timber on allotted lands. See Pet. 12-13, 16-17, 19-20. In reaching that conclusion, however, the Court emphasized two factors, *both* of which are absent here. First, the Court stated that "the statutes and regulations [at issue] clearly give the Federal Government *full* responsibility to manage Indian resources and land *for the benefit of the Indians*." 463 U.S. at 224 (emphasis added). Second, the Court emphasized that the statutes and regulations gave the government "elaborate control over forest and property belonging to Indians." *Id.* at 225.

The court of appeals below focused on the latter factor, and reasoned that "control alone is sufficient" to give rise to a money-mandating duty on the part of the United States. Pet. App. 15a. The Tribe agrees. See Br. in Opp. 17 n.22 (In *Mitchell II*, "[t]his Court recognized elaborate control by the Government over Indian property as an *independent* basis



for its finding of a fiduciary duty.") (emphasis added); see *id.* at 19-20 & n.24. But there are at least two fundamental flaws with that reasoning. First, in *Mitchell II*, the Court pointed to the existence of federal control not in the abstract, but rather in conjunction with its finding that the statutes and regulations at issue "clearly" obligated the government to "manage Indian resources and land for the benefit of the Indians." 463 U.S. at 224. Second, in *Mitchell II*, the Court focused on the existence of federal control not in a *factual* sense, but instead from the standpoint of management duties rooted in the express terms of the governing statutes and regulations. *Id.* at 224-225.

The Tribe asserts (Br. in Opp. 17 n.22) that *Mitchell II* "indicates that detailed delineation of management duties [is] not required." Just the opposite is true. The Court in *Mitchell II* explained at length that the pertinent statutes and regulations created extensive and carefully delineated management duties with respect to the trust property at issue. See 463 U.S. at 219-223; see *id.* at 220 ("The regulations addressed virtually every aspect of forest management."); *ibid.* ("Congress imposed * * * strict[] duties upon the Government with respect to Indian timber management."); *id.* at 222 ("The timber management statutes and the regulations promulgated thereunder establish the 'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber.") (citations omitted). The 1960 Act, by contrast, does not express *any* management duties with respect to the property at issue here, and does not provide for any implementing regulations prescribing any such duties.

The Tribe suggests (Br. in Opp. 15-16) that if Congress did not want to subject the United States to damages actions for failure to maintain the trust property covered by the 1960 Act, Congress "could have provided in the 1960 Act that * * * the Secretary would not be obligated to maintain, repair and preserve the property it was using," or it could

have excluded particular buildings from the Act's declaration that the property in question is to be held in trust. Of course that is true. But nothing in this Court's decisions obligates Congress to legislate *around* a supposed background rule that the United States is subject to damages claims with respect to alleged mismanagement of property held in trust for an Indian Tribe unless Congress says otherwise. The *Mitchell* decisions, not to mention the long-settled principles of sovereign immunity on which those decisions are grounded, establish precisely the opposite background rule. See Pet. 11-13.

c. Because the 1960 Act does not provide for the Secretary to assume any fiduciary management duty with respect to the property at issue, the court of appeals turned to the common law of trusts to supply such a duty. See Pet. App. 18a-19a ("Although neither the 1960 Act nor any pertinent regulation sets forth clear guidelines as to how the government must manage the property, we think it is reasonable to infer that the government's use of the property requires it to act in accordance with the duties of a common law trustee."). As explained in the petition (at 17-20), that, too, was error under the *Mitchell* framework. To establish a money-mandating obligation on the part of the United States, a management duty must be clearly grounded in a statute or implementing regulation, not simply drawn from the *Restatement of Trusts*. See *ibid.* The Tribe argues (Br. in Opp. 24 n.30) that "the standards of a private fiduciary must be adhered to by executive officials administering Indian property." This Court, however, has recognized that the federal government performs a role in its relations with the Indian Tribes that is different from that of a simple private trustee. See, *e.g.*, *Nevada* v. *United States*, 463 U.S. 110, 127-128 (1983). More to the point, while an analogy to a private trustee may be helpful in certain circumstances, the Court has never suggested that the United States assumes the *money-mandating* obligations of a common law trustee.



If that were true, there would have been no reason for the Court to devote its attention in *Mitchell I* and *Mitchell II* to ascertaining whether such an obligation existed in the governing statutes or regulations.

3. The Tribe argues (Br. in Opp. 22-23) that the notion that the existence of federal control alone "may be the basis for a money-mandating claim" is "a well-established principle in Federal Indian law and policy." That argument, too, is belied by *Mitchell II*. There, the Court explained that, under the Tucker Acts, claims for damages against the United States must be "founded upon statutes or regulations that create substantive rights to money damages." 463 U.S. at 218. Accordingly, in determining whether to allow the damages claims in *Mitchell II*, the Court focused not simply on the existence of "federal control" over the trust property at issue, but instead on whether the *statutes and regulations* on which the Indian plaintiffs based their claims "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties *they* impose." *Id.* at 219 (emphasis added); see *id.* at 228.

One of the most problematic aspects of the court of appeals' decision in this case is that it redirects the inquiry called for by the Tucker Acts and this Court's *Mitchell* decisions for determining whether the United States may be liable for damages for breach of trust from the terms of the governing statutes and regulations to a fact-bound examination of the extent to which the particular property at issue is subject to federal control or use. Accordingly, under the Federal Circuit's decision, the determination of whether, or to what extent, the United States is accountable for money damages for breach of trust with respect to the property placed in trust by the 1960 Act ultimately depends on a parcel-by-parcel inquiry into "the extent of the government's control and use" of the "many buildings and grounds comprising Fort Apache"—an inquiry the court

directed the Court of Federal Claims to conduct on remand. Pet. App. 18a; see *id.* at 31a; Pet. 21-22.

The Tribe recognizes (Br. in Opp. 22) the parcel-specific nature of the inquiry into "exclusivity of control" and "duration of use" that "the Court of Federal Claims would have to resolve upon remand," but asserts (*ibid.*) that "the same type [of] inquiry was condoned by this Court in *Mitchell I*." That is incorrect. As this Court specifically recognized in *Mitchell II*, in *Mitchell I* the Court remanded for consideration of whether "other *statutes* render the United States answerable in money damages for the alleged mismanagement in this case," 463 U.S. at 211 (emphasis added), and not for fact-finding concerning the existence, degree, or duration of federal control with respect to the particular allotments or forests at issue.

The Tribe refers to lower court decisions in arguing that federal control alone "may be the basis for a money-mandating claim." Br. in Opp. 23; see *id.* at 23-25 & nn.29-32. Some of those decisions predate this Court's *Mitchell* decisions, and some do not even involve claims for money damages (*Pyramid Paiute Tribe of Indians* v. *Department of the Navy*, 898 F.2d 1410 (9th Cir. 1990); *Northern Arapahoe Tribe* v. *Hodel*, 808 F.2d 741 (10th Cir. 1987)). In addition, none of the cases cited by the Tribe involved a statute, like the 1960 Act, that expressly reserves to the government the right to use the property at issue for its own purposes. In any event, to the extent that the cases in fact suggest—despite the teachings of this Court's *Mitchell* decisions—that federal control or use affecting a trust resource is sufficient in itself to give rise to a damages claim against the United States for breach of trust, those cases only heighten the need for review by this Court to ensure the proper application of sovereign immunity principles and the *Mitchell* decisions.

4. The Tribe's reliance (at 29 & n.36) on *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937), is not only misplaced,



but further underscores the extent to which the decision below departs from this Court's precedents. In *Shoshone Tribe*, the Court held that the United States was liable in damages to the Tribe for "breach of treaty stipulations," *id.* at 484, that specifically "charged the Government with a duty to see to it that strangers should never be permitted without the consent of the Shoshones to settle upon or reside in the Wind River Reservation," *id.* at 494. See *id.* at 486 (discussing the "solemn pledge" made by the United States). Moreover, the Tribe's claim for damages for breach of that express treaty duty was authorized by a specific jurisdictional act relating to the controversy. See *id.* at 484-485 & n.1. In short, quite unlike this case, in *Shoshone Tribe*, there was a clear textual basis for recognizing a money damages claim against the United States.

5. The Tribe fails in its attempt (Br. in Opp. 26-28) to downplay the importance of this case. As discussed in the petition (at 24-25), both the Federal Circuit and the Court of Federal Claims already have applied the fundamentally flawed reasoning of the decision below in considering damages claims against the United States for breach of an alleged trust responsibility owed to an Indian Tribe. See *United States* v. *Navajo Nation*, 263 F.3d 1325, 1329-1330, 1335 (2001), petition for cert. pending, No. 01-1375; *Shoshone Indian Tribe of the Wind River Reservation* v. *United States*, 51 Fed. Cl. 60, 68 (2001). Although the Tribe suggests (Br. in Opp. 27-28 & n.34) that the courts' reliance in those cases on the reasoning of the Federal Circuit's decision in this case is unremarkable, that suggestion is based entirely on the Tribe's mistaken belief that the decision below comports with the "*Mitchell I* and *II* criteria" (Br. in Opp. 27).

On March 15, 2002, the United States filed a petition for a writ of certiorari in *Navajo Nation* (No. 01-1375). As explained in that petition, the court of appeals' decision in *Navajo Nation* holds that the United States may be liable to the Navajo Nation for up to $600 million in damages for

breach of fiduciary duty in connection with the Secretary of Interior's actions concerning an Indian mineral lease, without finding that the Secretary had violated any specific statutory or regulatory duty assumed by the United States. The *Navajo Nation* decision—which, like the decision here, divided the Federal Circuit panel—also conflicts with this Court's *Mitchell* decisions. See No. 01-1375 Pet. at 16-26.

Although this case and *Navajo Nation* both concern the necessary predicate that an Indian Tribe must establish to bring a claim for damages against the United States for breach of fiduciary duty, they each present that issue in a quite different light due to the different statutory schemes involved in the two cases. Granting review in both this case and *Navajo Nation* would enable the Court to consider the proper application of its *Mitchell* decisions in a broader context. As these two cases alone demonstrate, questions concerning the amenability of the United States to damages actions for breach of trust are of substantial and recurring importance in the lower courts. The Court should grant review in both cases to ensure that it will be in a position to address those questions, and the proper application of its *Mitchell* decisions, in a comprehensive manner.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
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APRIL 2002

Supreme Court, U.S.
FILED
JUL
JUL 5 2002
CLERK

No. 01-1067

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

WHITE MOUNTAIN APACHE TRIBE

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES

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50 pp

## QUESTION PRESENTED

In 1960, Congress declared that a former military post in Arizona would "be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8. The question presented is whether that Act authorizes the award of money damages against the United States for alleged breach of trust in connection with such property.

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# In the Supreme Court of the United States

No. 01-1067

UNITED STATES OF AMERICA, PETITIONER

*v.*

WHITE MOUNTAIN APACHE TRIBE

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 249 F.3d 1364. The opinion of the court of federal claims (Pet. App. 37a-56a) is reported at 46 Fed. Cl. 20.

## JURISDICTION

The judgment of the court of appeals was entered on May 16, 2001. A petition for rehearing was denied on August 22, 2001 (Pet. App. 58a). On November 14, 2001, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 20, 2001. On December 11, 2001, the Chief Justice further extended the time within which to file a petition for a writ of certiorari to and including January 19, 2002. The petition for a writ of certiorari was filed on January 22, 2002 (the Tuesday after a Monday holi-

day), and was granted on April 22, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

1. The Act of March 18, 1960, Pub. L. No. 86-392, 74 Stat. 8, states:

> [A]ll right, title, and interest of the United States in and to the lands, together with the improvements thereon, included in the former Fort Apache Military Reservation * * * , and subsequently set aside by [25 U.S.C. 277], as a site for the Theodore Roosevelt School, located within the boundaries of the Fort Apache Indian Reservation, Arizona, are hereby declared to be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose.

2. Other pertinent statutory provisions—the Tucker Act, 28 U.S.C. 1491(a), Indian Tucker Act, 28 U.S.C. 1505, and 25 U.S.C. 277—are reproduced at Pet. App. 59a-60a.

## STATEMENT

This case concerns the threshold standard that governs in determining whether the United States is subject to suit for money damages for an alleged breach of fiduciary duty in connection with property that it holds in trust for an Indian Tribe.

1. The property at issue in this case is a former military post, Fort Apache, located within the boundaries of the Fort Apache Indian Reservation in east central



Arizona, just south of Whiteriver along Highway 73.[1] Fort Apache was established by the United States Army in 1870 and, with the surrounding 7579 acres, was set aside by President Grant in 1877 as a military reserve. In Arizona's territorial times, Fort Apache provided a strategic outpost from which federal soldiers —often aided by White Mountain Apache scouts— engaged Apache bands, including the one led by Geronimo. See O. Faulk, *The Geronimo Campaign* (1969). The Army operated the Fort until 1922, when an Executive Order placed it "under the control of the Secretary of the Interior" (Secretary) for use in accordance with federal law governing the disposal of abandoned military property (Act of July 5, 1884, ch. 214, 23 Stat. 103), or as otherwise provided by Congress. See S. Rep. No. 671, 86th Cong., 1st Sess. 3 (1959); Pet. App. 2a.

In 1923, Congress authorized the Secretary to establish the Theodore Roosevelt Indian School at Fort Apache, and provided "[t]hat the Fort Apache military post, and land appurtenant thereto, shall remain in the possession and custody of the Secretary of the Interior so long as they shall be required for Indian school purposes." Act of Jan. 24, 1923, ch. 42, 42 Stat. 1187 (25 U.S.C. 277). In the Act of March 18, 1960, Congress "declared" Fort Apache "to be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to

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[1] The reservation was established by an Executive Order in 1871. In 1897, Congress set aside a smaller portion of that reservation for use by the White Mountain Apache Tribe (Tribe). Act of June 7, 1897, ch. 3, 30 Stat. 64; see S. Rep. No. 671, 86th Cong., 1st Sess. 2-3 (1959). The Tribe is organized under Section 16 of the Indian Reorganization Act, 25 U.S.C. 476, and has about 12,000 members. Its government and undertakings are discussed at <<http://www.wmat.nsn.us>>.

use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." 74 Stat. 8.[2] Since 1960, the Secretary has continued to hold Fort Apache in trust, while operating the Theodore Roosevelt Indian School. Pet. App. 3a.

There are more than 30 buildings and other structures on Fort Apache. They include the officers' quarters, barracks, parade grounds, and stables and barns used by the cavalry that first occupied the fort; school facilities such as class rooms, dormitories, and a cafeteria; and administrative buildings such as storage and septic facilities. See Pet. App. 3a; Compl. App. A (listing buildings). Numerous buildings are more than a half a century old, and several date back to the fort's frontier days. Over time in the White Mountain environment, some buildings have fallen into varying states of disrepair, and a few structures have been condemned or demolished. See Pet. App. 3a.

In 1976, portions of Fort Apache, including the Theodore Roosevelt Indian School, were designated as a national historic district. Pet. App. 39a. In 1993, the Tribe adopted a master plan for repairing and restoring

[2] In 1960, approximately 410 acres of Fort Apache were used for school purposes. On the approximately 7169 acres that remained, Indians had built homes and other improvements, and had used the land for tribal grazing. S. Rep. No. 671, *supra*, at 3. In recommending passage of the 1960 Act, the Department of the Interior proposed the "subject to" clause that was subsequently enacted by Congress, explaining that it would reserve the right of the United States to continue to use "the property for the specified purposes." *Id.* at 2, 3. The Department further stated that "[t]his reserved right applies to any part of the land and improvements, and not merely to the lands and improvements that are presently in use. This will provide flexibility and permit modifications to be made in present administrative use without seeking new legislation." *Id.* at 4.



property within the historic district. In 1998, the Tribe commissioned a survey, which estimated that the cost of re-landscaping the historic district and refurbishing its buildings and improvements would be about $14 million. *Id.* at 3a-4a. The Tribe's master plan for Fort Apache was designed to maintain and rebuild the fort to preserve it "as a cultural and economic resource for the Tribe." *Id.* at 4a n.4; see Br. in Opp. 2 n.2 (discussing "Tribe's attempt to preserve [Fort Apache] for its tourism-based economy"); Tribe C.A. Reply Br. 3 (Fort Apache "has become an increasingly significant tourist attraction.").

2. In 1999, the Tribe filed this action against the United States in the Court of Federal Claims, alleging (Compl. para. 1) that the government breached "fiduciary obligations" to the Tribe in the course of the government's "use, occupation, control, supervision, management and administration" of Fort Apache "for administrative and school purposes." In particular, the Tribe alleged (*ibid.*) that the government "breach[ed] its fiduciary duty to maintain, protect, repair and preserve the Tribe's trust corpus." According to the complaint (paras. 32-33), that asserted fiduciary duty stems from the 1960 Act, as well as from certain other statutes and regulations.[3] The complaint (at 13) sought $14 million in damages to repair and refurbish Fort Apache property, as well as an unspecified amount of

[3] The additional statutes relied upon by the Tribe include the Snyder Act, 25 U.S.C. 13; National Historic Preservation Act, 16 U.S.C. 470 *et seq.*; Historic Sites, Buildings and Antiquities Act, 16 U.S.C. 462 *et seq.*; and 25 U.S.C. 177 (the Non-Intercourse Act). The courts below concluded that none of the historic-preservation or other statutes relied upon by the Tribe supported its claim for money damages, and the Tribe has not challenged those rulings in this Court. See Pet. App. 8a-10a, 47a-52a.

"[c]ompensation for the economic loss and value of annual lease/rental fees."

The United States moved to dismiss the complaint on the ground that, *inter alia*, the Court of Federal Claims lacked jurisdiction under the Tucker Act, 28 U.S.C. 1491, and the Indian Tucker Act, 28 U.S.C. 1505, which in relevant part grant jurisdiction with respect to claims "founded either upon the Constitution, or an Act of Congress or any regulation of an executive department." 28 U.S.C. 1491(a)(1). The government explained that under the Tucker Acts and this Court's decisions—including *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), and *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*)—the United States is not subject to suit for money damages with respect to the trust property at issue, because neither the 1960 Act nor any other Act of Congress or implementing regulation cited by the Tribe can fairly be interpreted as mandating the payment of compensation by the government for the alleged breach of trust.

The Court of Federal Claims granted the government's motion, and dismissed the complaint for failure to state a claim. Pet. App. 37a-56a. After reviewing the Tucker Acts and this Court's *Mitchell* decisions, the Court of Federal Claims stated that the dispositive inquiry in this case is whether, under the statutes or regulations identified by the Tribe, the United States owes the Tribe "any specific responsibilities with respect to the Fort Apache buildings and improvements that give rise to a money claim for breach of trust." *Id.* at 46a. The court answered that question in the negative. The court viewed "the 1960 Act as similar to the provisions of the General Allotment Act which [were] found insufficient to establish a money-mandating claim in *Mitchell I*." *Id.* at 47a. The court



further reasoned that, unlike the statutes in *Mitchell II*, "the 1960 Act does not direct the government to manage the Fort Apache site for the benefit of the Tribe." *Id.* at 48a. Instead, "[a]s the plain language indicates, the Act reserves the Fort Apache site for the federal government's benefit and not for the benefit of the Tribe." *Ibid.*

The Court of Federal Claims rejected the Tribe's argument that the government's "day-to-day occupation, use, control, or supervision of Fort Apache under the 1960 Act" created a fiduciary relationship and attendant obligations that, if breached, would authorize the payment of money damages. Pet. App. 50a. The court explained that the Tribe's argument "misconstrues * * * *Mitchell II* by focusing on the *extent*, rather than the *nature* of control necessary to establish [such] a fiduciary relationship." *Ibid.* (emphasis added). In that regard, the court emphasized that, although the 1960 Act "may give the government complete control over the Fort Apache site, [the Act does not] require that the government manage the Fort Apache site for the purpose of protecting the Tribe's financial interests. Indeed, the 1960 Act allows the government to manage and operate the land and buildings for its own benefit for as long as it needs them." *Id.* at 52a.[4]

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[4] The Court of Federal Claims also rejected the Tribe's argument that it was entitled to relief under the common law doctrine of permissive waste. Pet. App. 55a. The court explained that the Tribe failed to show that "an action for permissive waste establishes a money-mandating claim, as required under the Supreme Court's opinion in *Mitchell II*." *Ibid.* Even under the common law, the court concluded, "an action for permissive waste, even if proper, does not ordinarily give rise to a money claim." *Id.* at 53a. Rather, "the appropriate remedy for permissive waste is generally

3. a. The Court of Appeals for the Federal Circuit reversed and remanded. Pet. App. 1a-32a. The court of appeals agreed with the Court of Federal Claims that none of the historic-preservation or other statutes relied upon by the Tribe established any substantive right to money damages against the United States for the alleged breach of trust. See *id.* at 8a-10a. But the court reached the opposite conclusion with respect to the 1960 Act. The court acknowledged that the 1960 Act does not "direct[] the United States to manage the trust corpus for the benefit of the beneficiaries, *i.e.*, the Native Americans." *Id.* at 14a. The court likewise acknowledged that "the 1960 Act does not explicitly define the government's obligations" with respect to the property. *Id.* at 19a. Nonetheless, the court "infer[red] that the government's use of any part of the property requires the government to act in accordance with the duties of a common law trustee." *Id.* at 18a.

The court of appeals then looked to "the common law of trusts, particularly as reflected in the *Restatement (Second) of Trusts*," to define the scope of the government's obligations—including the extent to which the government may be held accountable in damages for any breach of trust. Pet. App. 19a, 26a. Under the common law, the court concluded, a private trustee in the government's position "has an affirmative duty to act reasonably to preserve the trust property." *Id.* at 20a. The court further determined that, under common law principles, the failure to abide by that duty would give rise to a claim for money damages against a trustee. *Id.* at 28a. In reaching that conclusion, the court decided that the Tribe's interest in the property was

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an injunction," which the Tribe did not request in its complaint for money damages. *Id.* at 54a.



better characterized "as an indefeasibly vested future interest" than as a "contingent future interest" (for which, the court recognized, damages would not be available under common law). *Id.* at 27a-28a.

The court of appeals remanded for a parcel-by-parcel determination of what trust property is in fact "under United States control," which in the court's view, would trigger an obligation on the part of the United States that, if breached, would mandate the payment of money damages. See Pet. App. 31a ("On remand, the Court of Federal Claims must determine which portions of the property were under United States control."); *id.* at 18a. In doing so, the court noted that the "record in this case is unclear as to the extent of the government's control and use of the many buildings and grounds comprising Fort Apache." *Ibid.*

b. Chief Judge Mayer dissented. Pet. App. 33a-36a. In his view, the key question under the *Mitchell* framework is whether "the statute or regulations give the government full responsibility for managing Indian resources and land for the benefit of the Indians." *Id.* at 33a. He reasoned that—like the General Allotment Act in *Mitchell I*—the 1960 Act fails to meet that test. In particular, he noted that "[n]othing in the 1960 Act imposes a fiduciary responsibility to manage the fort for the benefit of the Tribe and, in fact, it specifically carves the government's right to unrestricted use for the specified purposes out of the trust." *Id.* at 33a-34a. Thus, Chief Judge Mayer concluded that the United States "has no fiduciary obligation to maintain the land and improvements for the Tribe that could lead to money damages," and he would have affirmed the dismissal of the Tribe's complaint on that basis. *Id.* at 34a.

Chief Judge Mayer saw no need to delve into the common law to decide that threshold issue. Nonetheless, he also disagreed with the majority's common law analysis, and would have affirmed on that "independent ground" as well. Pet. App. 36a. He explained that under the common law, "the owner of a contingent future interest has no right to sue for money damages for permissive waste," and that the Tribe only held such a contingent future interest, because its interest in the property was subject to the "condition precedent * * * that the government no longer needs to use the property for school or administrative purposes." *Id.* at 34a, 35a.

## SUMMARY OF ARGUMENT

The 1960 Act does not establish any substantive right to money damages against the United States for the breach of trust alleged by the Tribe.

A. The basic principles governing the resolution of this case are well-settled and vital to the operation of the federal government. The United States is immune from suit for damages, or any other relief, unless Congress unequivocally consents to such a suit. In the Tucker Act and Indian Tucker Act, Congress has consented to certain damages actions against the government by conferring jurisdiction on the Court of Federal Claims to render judgment with respect to claims based on the Constitution, an Act of Congress or implementing regulation, or a contract with the United States. 28 U.S.C. 1491(a)(1); see 28 U.S.C. 1505. When, as here, a claim for damages is based on an Act of Congress, "a court must inquire whether [the Act] can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *Mitchell II*,



463 U.S. at 218. The touchstone, in short, is the intent of Congress.

B. The requisite statutory intent is absent in this case. The 1960 Act does not create a right to be paid a sum certain; does not speak in terms of money damages or claims; and, indeed, does not have any monetary character to it at all. The Act does declare that the property at issue is to be held "in trust." But in *Mitchell I*, this Court rejected the argument that language creating such a bare trust authorizes the payment of money damages against the government for an alleged breach of trust. The 1960 Act is an even more unlikely source of a right to money damages than the General Allotment Act, at issue in *Mitchell I*, because the 1960 Act explicitly carves out of the trust the right of the government to use the property for the government's *own* purposes "for as long as" the government deems such use necessary. 74 Stat. 8. *Mitchell II* does not require a different interpretation. The statutes and regulations in that case, the Court held, "clearly" established fiduciary management duties that, if breached, would mandate the payment of damages by the federal government. 463 U.S. at 226. The 1960 Act does not establish *any* explicit management duties, much less specific duties of a fiduciary nature that could be interpreted as mandating money damages if breached.

C. None of the secondary considerations on which the court of appeals relied justifies recognition of an implied right to a damages remedy in this case. The existence of "federal control" over Indian property or resources does not automatically subject the United States to a suit for money damages with respect to such property. Although this Court noted in *Mitchell II* that the government exercised "elaborate control" over

Indian timber lands, 463 U.S. at 225, it focused on the existence of such control not in a *factual* sense, but rather from the standpoint of the "fiduciary management duties" (*id.* at 218) explicitly created as a *legal* matter by the statutes and regulations at issue in that case. Thus, the Court did not base its holding in *Mitchell II* that money damages were available on freestanding notions of federal control. Rather, the Court rested its holding on its determination that the *statutes and regulations* at issue clearly authorized money damages. The 1960 Act at issue here contains no such authorization.

The court of appeals also erred in fashioning fiduciary duties—and potential liability for breach of those duties—from the *Restatement (Second) of Trusts*. Under the Tucker Acts and this Court's decisions interpreting those Acts, a damages claim against the federal government must be grounded upon the violation of a "source of *substantive* law," such as an Act of Congress or implementing regulation. *Mitchell II*, 463 U.S. at 216-217, 218 (emphasis added). There is no basis for subjecting the United States to liability based on unanchored, judge-made concepts of common law, and no basis for concluding that Congress intends, *sub silentio*, to assume on behalf of the United States the potential liabilities of a private, common law trustee whenever it places property in trust on behalf of an Indian Tribe (or anyone else).

Nor does the mere existence of a general relationship of trust with an Indian Tribe subject the federal government to damages claims for violation of any alleged fiduciary responsibilities flowing from that relationship. The Court squarely rejected that theory in *Mitchell I*. And although the Court did discuss the existence of the general trust relationship between the United States



and the Indian claimants in *Mitchell II*, the Court's decision in *Mitchell II* is firmly grounded on its determination that the *statutes and regulations* at issue could fairly be interpreted as authorizing damages for the violation of the duties imposed by those substantive provisions of law. Any other reading of *Mitchell II* would be precluded by the terms and history of the Indian Tucker Act, which make clear that Congress intended Indian Tribes to enjoy the *same*—not more favorable—rights to money damages against the United States as other claimants.

D. Recent decisions of this Court outside the Tucker Act context refusing to recognize implied private causes of action or remedies in the absence of unambiguous congressional intent underscore the institutional and separation-of-powers concerns that arise when courts venture beyond the intent of Congress in deciding whether, or what, remedies are available for asserted violations of federal law. Those same considerations apply with equal, if not greater, force when it comes to inferring a damages action against the sovereign itself under the Tucker Act, where Congress has not expressly provided that damages will be available. Because the only statute at issue in this case—the 1960 Act—does not clearly authorize this damages action, the court of appeals erred in allowing it to proceed.

## ARGUMENT

### THE 1960 ACT DOES NOT AUTHORIZE THE AWARD OF MONEY DAMAGES AGAINST THE UNITED STATES FOR THE ALLEGED BREACH OF TRUST

#### A. The United States Is Immune From Suit For Money Damages Except As Clearly Authorized By Congress

Although this case concerns a suit brought by an Indian Tribe, it turns on basic principles of general applicability governing the sovereign immunity of the United States from suit, and the limited statutory jurisdiction of the Court of Federal Claims to entertain claims for money damages against the United States.

1. "It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Mitchell I*, 445 U.S. at 538 (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)); see *Eastern Transp. Co.* v. *United States*, 272 U.S. 675, 686 (1927); *United States* v. *Alire*, 73 U.S. (6 Wall.) 573, 575 (1867). In determining whether the United States has granted such consent, this Court has long held that "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Mitchell I*, 445 U.S. at 538 (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)); accord *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999); *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). That settled rule applies with equal force with respect to Indian plaintiffs. *United States* v. *Mottaz*, 476 U.S. 834, 851 (1986).

2. Pursuant to the Tucker Act and the Indian Tucker Act, Congress has granted its consent for the



United States to be sued on certain claims for money damages. 28 U.S.C. 1491, 1505. The Tucker Act grants the Court of Federal Claims jurisdiction with respect to

> any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. 1491(a)(1). The Indian Tucker Act, in turn, grants jurisdiction in the same court with respect to claims by an Indian Tribe, band, or other identifiable group of Indians, against the United States, "whenever such [a] claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group." 28 U.S.C. 1505.

As this Court has explained, the Indian Tucker Act was enacted to ensure that an Indian Tribe would enjoy the "same" rights and remedies in suits against the United States as non-Indians, but no more. *Mitchell I*, 445 U.S. at 539; see *Mitchell II*, 463 U.S. at 212 n.8. The House Report accompanying the Indian Tucker Act explains that Indian "claimants are to be entitled to recover *in the same manner, to the same extent, and subject to the same conditions and limitations*, and the United States shall be entitled to the same defenses, both at law and in equity, * * * as in cases brought [under the Tucker Act] by non-Indians." H.R. Rep. No. 1466, 79th Cong., 1st Sess. 13 (1945) (emphasis added).

The Tucker Act does "not create any substantive right enforceable against the United States for money

damages." *Mitchell II*, 463 U.S. at 216; see *Army & Air Force Exch. Serv.* v. *Sheehan*, 456 U.S. 728, 738 (1982); *United States* v. *Testan*, 424 U.S. 392, 398 (1976). And the Indian Tucker Act "no more confers a substantive right against the United States to recover money damages than does 28 U.S.C. § 1491." *Mitchell I*, 445 U.S. at 540. Thus, in order to state a cause of action for money damages under one of the Tucker Acts, a plaintiff suing other than for breach of contract must point to some other "Act of Congress," or a "regulation of an executive department," 28 U.S.C. 1491(a)(1), that "*can fairly be interpreted as mandating compensation* by the Federal Government for the damage sustained." *Mitchell II*, 463 U.S. at 216-217 (quoting *Testan*, 424 U.S. at 400, and *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)) (emphasis added); see *Bowen* v. *Massachusetts*, 487 U.S. 879, 905-906 n.42 (1988); *Sheehan*, 456 U.S. at 739.[5] The requisite waiver of sovereign immunity exists under the Tucker Acts if, and only if, "a claim falls within th[at] category." *Mitchell II*, 463 U.S. at 218; see *OPM* v. *Richmond*, 496 U.S. 414, 431 (1990).

A statute that creates "a right to be paid a certain sum," *Eastport S.S. Corp.*, 372 F.2d at 1007, generally can be interpreted as mandating compensation for its breach. See *Nordic Village*, 503 U.S. at 34 (statute creating "right[s] to payment"); *Medbury* v. *United States*, 173 U.S. 492, 497 (1899) (statute creating right to be "repaid"). The same conclusion typically follows if a statute "speaks in terms of money damages or of a money claim against the United States." *Gnotta* v.

[5] The Indian Tucker Act also permits claims by an Indian Tribe based on a treaty of the United States or an Executive Order of the President. 28 U.S.C. 1505. No such claim is at issue here.



*United States*, 415 F.2d 1271, 1278 (8th Cir. 1969), cert. denied, 397 U.S. 934 (1970); see *Mitchell II*, 463 U.S. at 232 n.6 (Powell, J., joined by Rehnquist and O'Connor, JJ., dissenting) ("Although not dispositive, the monetary character of a statutory right is a strong indication that a statute 'in itself . . . can fairly be interpreted as mandating compensation.'"); cf. *Gonzaga Univ.* v. *Doe*, 122 S. Ct. 2268, 2274 (2002) (right of action has been recognized under 42 U.S.C. 1983 when a federal statute "conferred specific monetary entitlements"). In addition, statutes that "attempt to compensate a particular class of persons for past injuries or labors" have been interpreted as mandating compensation for the damages sustained. *Bowen*, 487 U.S. at 906 n.42; see generally Developments in the Law, *Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 882-883 (1957).[6]

This Court has observed that "the substantive source of law may grant the claimant a right to recover damages either 'expressly or by implication.'" *Mitchell II*, 463 U.S. at 217 n.16; but cf. *Sheehan*, 456 U.S. at 739-740 ("*Testan* [held] that the Tucker Act provides a remedy only where damages claims against the United States have been authorized explicitly."). But the Court is reluctant to recognize a damages remedy against the United States under the Tucker Acts when a statute does not clearly sanction one. See *Testan*, 424 U.S. at 400 ("We are not ready to tamper with these established principles [concerning the reach of the Tucker Act] because it might be thought that they

[6] The Court has suggested that an action also may be brought under the Tucker Act when the United States has "improperly exacted or retained" money. *Testan*, 424 U.S. at 401; see *Sheehan*, 456 U.S. at 739 n.11. This case does not involve any such claim.

should be responsive to a particular conception of enlightened governmental policy."); see also *Mitchell II*, 463 U.S. at 218 ("Of course, in determining the general scope of the Tucker Act, this Court has not lightly inferred the United States' consent to suit.").

That restraint reflects the general rule that waivers of sovereign immunity must be unequivocally expressed. See *Mitchell I*, 445 U.S. at 538; *Richmond*, 496 U.S. at 432. And such restraint is now all the more necessary in light of the Court's repeated refusal in recent decisions to recognize implied private causes of action or remedies outside the Tucker Act context. See, *e.g.*, *Gonzaga*, 122 S. Ct. at 2275 (federal statute must contain "unambiguously conferred right" for suit to lie under Section 1983); *Correctional Servs. Corp.* v. *Malesko*, 122 S. Ct. 515 (2001) (declining to extend *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to new context); *Alexander* v. *Sandoval*, 532 U.S. 275 (2001) (no implied right of action to enforce disparate-impact regulations under Title VI); *FDIC* v. *Meyer*, 510 U.S. 471, 483-486 (1994) (declining to recognize implied right of action under *Bivens* against federal government).

3. This Court's *Mitchell* decisions specifically involved actions by Indian claimants under the Tucker Acts governed by the basic principles outlined above concerning claims against the United States generally. In the *Mitchell* litigation, the Quinault Tribe and individual Indians sought damages from the United States for alleged breach of fiduciary duties with respect to timberlands on the Quinault Indian Reservation that had been allotted in trust to individual Indians. In *Mitchell I*, the Court held that the General Allotment Act—under which the United States holds allotted lands "in trust for the sole use and benefit of



[Indian allottees]," 445 U.S. at 541 (quoting 25 U.S.C. 348)—did not authorize a damages action against the United States for alleged mismanagement of timber resources on allotted lands. The Court explained that the General Allotment Act created "only a limited trust relationship between the United States and the [Tribe]," and did "not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." *Id.* at 542.[7] Thus, the Court held, the Act did not support "[a]ny right of [the Indians] to recover money damages for Government mismanagement of timber resources." *Id.* at 546.

In *Mitchell II*, the Court considered a different set of statutes and regulations and held that those provisions, unlike the General Allotment Act, could "fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they impose[d]." 463 U.S. at 219. In so holding, however, the Court emphasized that the provisions established "comprehensive responsibilities of the Federal Government in managing the harvesting of Indian timber," *id.* at 222; see *id.* at 221 (regulations "required the preservation of Indian forest lands in a perpetually productive state"), and that "the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources." *Id.* at 226.[8] The Court

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[7] The Court explained that Congress provided for allotted lands to be held "in trust" simply because it wanted to prevent alienation of the land and to ensure that allottees would be immune from state taxation. *Mitchell I*, 445 U.S. at 544.

[8] Indeed, each of the plaintiffs' claims in *Mitchell II* tracked specific duties set forth in applicable statutes or regulations. See 463 U.S. at 210; see also, *e.g.*, 25 U.S.C. 406(a) (proceeds from

distinguished *Mitchell I*, stating: "In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government *full responsibility* to manage Indian resources and land *for the benefit of the Indians*." *Id.* at 224 (emphasis added); see *id.* at 226.[9]

As explained below, a proper understanding of the *Mitchell* decisions—and application of the basic principles governing suits against the United States and limitations on implied rights to recover money damages—compels the conclusion that the 1960 Act does not authorize the damages action in this case.

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timber sales "shall be paid to the owner or owners or disposed of for their benefit"); 25 U.S.C. 413 (administrative fees must be "reasonable"); 25 U.S.C. 466 (Secretary must manage Indian forestry units "on the principle of sustained-yield management"); 25 C.F.R. 163.4 (1985) (requiring sustained-yield management); 25 C.F.R. 163.7(c) (1985) (timber "shall be appraised" and sold at not less than appraised value, except as authorized); 25 C.F.R. 163.18 (1985) (administrative fees must be "reasonable").

[9] Justice Powell, joined by then-Justice Rehnquist and Justice O'Connor, dissented in *Mitchell II*. 463 U.S. at 228-238. In their view, even the statutes and regulations in that case failed to confer "the necessary legislative authorization of a damages remedy" against the United States, because "[n]one of [those provisions] contains any 'provision . . . that expressly makes the United States liable' for its alleged mismanagement of Indian forest resources and their proceeds or grants a right of action 'with specificity.'" *Id.* at 230 (quoting *Testan*, 424 U.S. at 399, 400). They emphasized that "courts are not free to dispense with 'established principles' requiring explicit congressional authorization for maintenance of suits against the United States simply 'because it might be thought that they should be responsive to a particular conception of enlightened governmental policy.'" *Id.* at 232 (quoting *Testan*, 424 U.S. at 400).



**B. The 1960 Act Does Not Contain The Requisite Clear Authorization By Congress Of A Suit For Money Damages For The Alleged Breach Of Trust**

1. The damages claim at issue is based solely on the 1960 Act. That Act, however, cannot "fairly be interpreted as mandating compensation by the Federal Government for the [alleged] damages sustained" by the Tribe. *Mitchell II*, 463 U.S. at 217. The 1960 Act does not refer to any "right to be paid a certain sum," *Eastport S.S. Corp.*, 372 F.2d at 1007, nor does it "speak[] in terms of money damages or of a money claim against the United States," *Gnotta*, 415 F.2d at 1278. To the contrary, the Act simply "declared" Fort Apache "to be held by the United States in trust for the [Tribe], subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." 74 Stat. 8. That declaration has no "monetary character" at all. *Mitchell II*, 463 U.S. at 232 n.6 (dissent). And, on its face, the 1960 Act is a much less likely source of a substantive right to money damages than either of the statutes that this Court found inadequate to confer such a right in *Testan*.

In *Testan*, federal employees brought suit against the United States claiming that they were entitled to a higher salary under the Classification Act and damages under the Back Pay Act for lost pay due to their allegedly improper classification. Applying the Tucker Act principles discussed above, the Court held that neither statute could fairly be interpreted as mandating compensation by the government for the alleged wrong. The Court explained that, although the Classification Act created "substantive standards for grading particular positions," and was expressly motivated by the "principle of equal pay for substantially equal work,"

the Act did not explicitly mandate—and could not fairly be interpreted as mandating—compensation by the United States for the alleged misclassification. 424 U.S. at 399-400; see *id.* at 401-402. In addition, although the Back Pay Act *did* create a "monetary remedy" for certain wrongful acts, the Court held that that Act, "as its words so clearly indicate, was intended to grant a monetary cause of action only to those who were subjected to a reduction in their duly appointed emoluments or position." *Id.* at 405-407.

Unlike the Classification Act, the 1960 Act at issue in this case does not explicitly impose any substantive standards *at all* on the conduct of the government, much less standards or duties owed to a third party that are sufficiently specific to form the predicate for a monetary claim. Compare *Gonzaga*, 122 S. Ct. at 2273 (federal statute must "confer[] entitlements sufficiently specific and definite to qualify as enforceable rights" under Section 1983) (internal quotation omitted); *id.* at 2274 ("specific, individually enforceable rights"). To the contrary, the 1960 Act simply places property "in trust," then reserves to the government the broad "right" to use the property for the government's *own* purposes "for as long as" the government deems necessary. 74 Stat. 8. In addition, unlike the Back Pay Act, the 1960 Act contains no reference to any monetary relief for any alleged wrong.[10]

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[10] In *Testan*, this Court relied upon the Court of Claims' decision in *Eastport Steamship Corp.* v. *United States*, *supra*. See *Testan*, 424 U.S. at 402. *Eastport Steamship* involved a suit for money damages against the federal government by a shipping company that alleged that the Federal Maritime Commission had improperly withheld its consent to a proposed foreign sale of a vessel—which was required under the Shipping Act—"while the agency was secretly formulating an illegal policy of selling such approvals for money." 372 F.2d at 1007. The company sought damages for lost business due to the agency's alledgedly improper refusal to approve the foreign sale. The Court of Claims held that jurisdiction was lacking under the Tucker Act on the ground that the Shipping Act "cannot be held to command, in itself and as correctly interpreted, the payment of money to the claimant." *Id.* at 1008. The court explained that, "[o]n its face the [statute] is simply a regulatory measure," and that "not a word in the text suggest[s] that the United States will compensate an applicant who suffers a business loss because of the Commission's improper failure to grant [a requested approval]." *Id.* at 1009. So too here, not a word in the 1960 Act suggests that the United States owes any duties to the Tribe or is obligated to compensate the Tribe for any alleged damages with respect to the property, much less suggests that the United States owes such duties or is obligated to pay damages while it is still using the property for government purposes.



2. The fact that the 1960 Act places the property at issue "in trust" does not mean that it mandates compensation for the alleged breach of trust. That is the lesson of *Mitchell I*. The statute in that case—the General Allotment Act—explicitly obligated the United States to hold allotted lands "in trust for the *sole* use and benefit of the Indian [allottees]." *Mitchell I*, 445 U.S. at 541 (emphasis added). The Court of Claims in *Mitchell I* reasoned that "[t]he trust language in the statute means that compensation can be recovered for a breach of trust [under the Tucker Act]." *Mitchell* v. *United States*, 591 F.2d 1300, 1303 (Ct. Cl. 1979). Similarly, the dissenting Justices in this Court reasoned that the General Allotment Act could "fairly be interpreted as mandating compensation" because it "explicitly creates a 'trust.'" *Mitchell I*, 445 U.S. at 547 (White, J., joined by Brennan and Stevens, JJ.); see *ibid.* ("The Act could hardly be more explicit as to the status of allotted lands. They are to be held by the

United States '*in trust for the sole use and benefit of the Indian [allottees].*'"). The Court disagreed.

The Court explained that the General Allotment Act "created only a *limited* trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources." 445 U.S. at 543 (emphasis added). See *Mitchell II*, 463 U.S. at 224 (In *Mitchell I*, "this Court recognized that the General Allotment Act creates a trust relationship between the United States and Indian allottees but concluded that the trust relationship was limited."). Accordingly, even though the General Allotment Act explicitly placed the allotted Indian lands "in trust" for the Indian allottees, the Court held that "[a]ny right of the [Indian claimants] to recover money damages for Government mismanagement of timber resources must be found in some source other than that Act." *Mitchell I*, 445 U.S. at 546.

The trust relationship created by the 1960 Act is even more limited than the one in *Mitchell I* and, thus, an even more unlikely source of a substantive right to money damages for breach of trust. Whereas the statute in *Mitchell I* required the United States to hold property "in trust for the *sole* use and benefit of the Indian [allottees]," 445 U.S. at 541 (emphasis added), the 1960 Act specifically carves *out* of the trust the right of the federal government to use Fort Apache for the government's *own* purposes "for as long as" the government deems such use necessary. 74 Stat. 8. Indeed, the 1960 Act "subject[s]," and thus subordinates, the trust to that open-ended right of the government. *Ibid.*

As Chief Judge Mayer explained in his dissent:



> Nothing in the 1960 Act imposes a fiduciary responsibility to manage the fort for the benefit of the Tribe and, in fact, it specifically carves the government's right to unrestricted use for the specified purposes out of the trust. Although the school is for the benefit of the Tribe, the 1960 Act expressly permits, but does not require, the government to use the fort as an Indian school. The use of the phrase "for as long as they are needed," far from expressing a fiduciary obligation, vests discretion in the Secretary of the Interior to determine how long to operate the Indian school.

Pet. App. 33a-34a; see *id.* at 48a (Court of Federal Claims) ("As the plain language indicates, the [1960] Act reserves the Fort Apache site for the federal government's benefit and not for the benefit of the Tribe."); *id.* at 52a (same). The Act's carve-out provision, in itself, compels the conclusion that the statute does not authorize money damages for any alleged breach of trust while the government is still using the property for its *own* purposes.

In any event, even if Congress had not included that carve-out provision, the resulting—and still bare—trust created by the 1960 Act would not support the Tribe's damages claim. Many of the buildings or structures on Fort Apache are more than a century old and most are decades old. There is no evidence that in enacting the 1960 Act, Congress intended to impose on the Secretary of the Interior an ongoing duty to maintain those buildings beyond their useful life, much less to undertake historic-preservation efforts at Fort Apache and to mandate the payment of damages to the Tribe if the Secretary failed to keep the fort in the state necessary to boost the Tribe's own "tourism-based economy." Br.

in Opp. 2 n.2; see Pet. App. 4a n.4. Putting fiscal constraints to one side, all can agree that the historic preservation or restoration of Fort Apache is a worthy ideal. But recognizing that ideal does not mean that the 1960 Act creates a substantive right to recover damages against the government based on allegations that it is not doing, or spending, more to keep the fort in its Old West shape.

3. Nothing in *Mitchell II* suggests a different conclusion. In *Mitchell II*, the Court held that the statutes and regulations at issue did support the Tribe's damages claim against "the Federal Government for violations of its fiduciary responsibilities in the management of Indian property." 463 U.S. at 228. But the Court grounded that holding on its determination that the statutes and regulations established clear and specific fiduciary obligations on the part of the government to manage the property for the benefit of the Indians. See *id.* at 226 ("Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained."); *id.* at 219-225. In addition, the Court emphasized that, unlike the statute in *Mitchell I*, "the statutes and regulations now before us give the Federal Government *full responsibility* to manage Indian resources and land *for the benefit of the Indians*." *Id.* at 224 (emphasis added).

This case is entirely different. It does not involve a "comprehensive" regulatory scheme under which the federal government has assumed "*full* responsibility to manage Indian resources and land for the benefit of the Indians," 463 U.S. at 222, 224 (emphasis added), or, indeed, anything remotely resembling such a regime.



As the court of appeals acknowledged, unlike the statutes and regulations in *Mitchell II* (see *id.* at 219-223), "neither the 1960 Act nor any pertinent regulation sets forth clear guidelines" with respect to management of the trust property in this case, and there is "no * * * requirement" in the statute or any regulation that the United States manage the property "for the benefit" of the Tribe. Pet. App. 14a, 18a. As Chief Judge Mayer underscored in his dissenting opinion below, "[n]othing in the 1960 Act imposes a fiduciary responsibility to manage the fort *for the benefit of the Tribe*"; instead, the Act "specifically carves the government's right to unrestricted use for the specified purposes out of the trust." *Id.* at 33a-34a (emphasis added).

In addition, as this Court observed in *Mitchell II*, the statutes and regulations in that case "clearly require[d] that the Secretary manage Indian resources so as to generate proceeds for the Indians," and thus at least had an arguable monetary flavor to them. 463 U.S. at 226-227; see *id.* at 221-222 ("The regulatory scheme was designed to assure that the Indians receive 'the benefit of whatever profit [the forest] is capable of yielding.'"). The statute here is not in any way addressed to the generation of proceeds or profit making. The 1960 Act was passed as an administrative housekeeping measure to deal more formally with the underlying title to the land in the wake of the military's departure from Fort Apache, while allowing the Department of the Interior to continue to use the property as it had before. See S. Rep. No. 671, *supra*, at 3.[11] To the extent that the

[11] The Senate Report accompanying the 1960 Act states: "Inasmuch as (1) the 7,579 acres were originally a part of a much larger Indian reservation, (2) they were withdrawn for military purposes and later reserved for Indian educational purposes, (3) only 410

statute refers to the use of the property, it is to the government's own right "to use any part of the land and improvements for *administrative or school purposes*," 74 Stat. 8 (emphasis added), not for the generation of proceeds or profits for the Tribe.

4. None of the general canons of statutory construction in Indian cases on which the Tribe relies (see Br. in Opp. 13) supports a contrary result. Under general principles of sovereign immunity, the Tucker Acts, and this Court's *Mitchell* decisions, the Tribe must point to a provision of an Act of Congress or implementing regulation that confers a substantive right and can fairly be interpreted as mandating the payment of money damages for a violation. There is not a word in the 1960 Act—the only substantive source of law on which the Tribe relies—that suggests the existence of such a mandate. Just as Indian canons of construction cannot overcome the plain meaning of an Act of Congress, see, *e.g.*, *Chickasaw Nation* v. *United States*,

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acres are still needed for school purposes, (4) and the remainder are completely surrounded by the Indian reservation land, it would be impractical to dispose of them for purposes other than Indian use and we believe that it is reasonable to restore them to the reservation *subject to the right of the United States to continue to use them for school or administrative purposes as long as they are needed*." S. Rep. No. 671, *supra*, at 2, 3 (emphasis added) (quoting Department of the Interior letter). In addition, as noted above, the Act's carve-out provision was added at the suggestion of the Department of the Interior to "provide flexibility and permit modifications to be made in the present administrative use without seeking new legislation." *Id.* at 4. There is no evidence in the legislative history of the 1960 Act (or any other source) that Congress had in mind the management of the property for the generation of any proceeds on behalf of the Tribe, whether from operation of the Theodore Roosevelt Indian School or from efforts to attract tourists to Fort Apache.



122 S. Ct. 528, 535-536 (2001); *Negonsott* v. *Samuels*, 507 U.S. 99, 110 (1993); *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986), those canons cannot supply the affirmative textual basis required for the Tribe's claim when the Act of Congress on which it relies is silent. And, in any event, Congress made clear when it enacted the Indian Tucker Act in 1946 that the *same* principles are to govern recognition of a damages remedy for an Indian Tribe that apply in the case of a non-Indian plaintiff. See p. 15, *supra*.

Moreover, the Tribe's invocation of the Indian canons to claim a property interest under the statutory grant in derogation of the express statutory reservation to the United States of the right to use both the land and the improvements for its own government purposes is contrary to the established canon that "land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983).

### C. The Court Of Appeals Erred In Concluding That Money Damages Are Nonetheless Available For The Alleged Breach Of Trust

In concluding that money damages are available for the alleged breach of trust, the court of appeals ranged far from the text of the 1960 Act, or any indicia of actual congressional intent in enacting it. None of the secondary considerations on which it relied support recognition of a damages remedy.

1. The court of appeals reasoned that, under *Mitchell II*, "control alone is sufficient to create a fiduciary relationship" that is enforceable against the United States in an action for money damages. Pet.

App. 15a. The Tribe agrees. See Br. in Opp. 17 n.22 (In *Mitchell II*, "[t]his Court recognized elaborate control by the Government over Indian property as an *independent* basis for its finding of a [money-mandating] duty.") (emphasis added); see *id.* at 19-20 & n.24. That reasoning is unavailing.

a. Most fundamentally, the control test conflicts with the well-established principle—recognized and applied by this Court in both *Mitchell I* and *Mitchell II*—that to establish that the United States is accountable for money damages, a plaintiff must point to an Act of Congress, implementing regulation, or other source of substantive *law* that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Mitchell II*, 463 U.S. at 217; see *Mitchell I*, 445 U.S. at 540; *Testan*, 424 U.S. at 400. Under the approach adopted by the court of appeals, by contrast, the liability of the United States in connection with a given piece of property or resource would turn on a *factual* determination concerning the extent of the government's control over the property or resource. Such an inquiry would not be anchored in any statutorily specified duty owed to the Tribe, and would be far removed from the customary focus on the intent of Congress in deciding what claims fall within a waiver of sovereign immunity.

Furthermore, the control test adopted by the court of appeals is directly contradicted by the *Mitchell* decisions, especially the second. In finding that the statutes and regulations at issue established a substantive right to money damages, the Court in *Mitchell II* did point to the fact that the government had assumed "elaborate control over forests and property belonging to Indians," *i.e.*, the trust property. 463 U.S. at 225. But the Court did not state, much less hold, that such control "alone"



(Pet. App. 15a) supported the Tribe's damages claim. And the Court did not point to federal control in the abstract, but rather in conjunction with its finding that the statutes and regulations at issue "clearly" obligated the government to "manage Indian resources and land *for the benefit of the Indians*." 463 U.S. at 224 (emphasis added). At the same time, the Court focused on federal control not in a *factual* sense, but instead from the standpoint of "fiduciary management duties" (*id.* at 218) rooted in the express terms of the statutes and regulations at issue. *Id.* at 224-225.

The Court explained in detail in *Mitchell II* that the pertinent statutes and regulations created extensive and carefully delineated management duties with respect to the trust property at issue. See 463 U.S. at 219-223; see *id.* at 220 ("The regulations addressed virtually every aspect of forest management."); *ibid.* ("Congress imposed * * * strict[] duties upon the Government with respect to Indian timber management."); *id.* at 222 (in amending the pertinent statutes, Congress "again emphasiz[ed] the Secretary of the Interior's management duties"); *ibid.* ("The timber management statutes and the regulations promulgated thereunder establish the 'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber.") (internal citations omitted). The 1960 Act, by contrast, does not express *any* management duties with respect to the property at issue, and in particular does not specify any duties required to be undertaken for the benefit of the Tribe.[12]

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[12] The Tribe has suggested that certain lower court decisions support the notion that federal control alone "may be the basis for a money-mandating claim." Br. in Opp. 23; see *id.* at 23-25 & nn.29-32. Some of those decisions predate this Court's *Mitchell* deci-

b. The control test also cannot be squared with this Court's recognition of the need for clear and predictable rules in the area of sovereign immunity, see *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991) ("In traditionally sensitive areas, * * * the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."), quoted in *Raygor* v. *Regents of the Univ. of Minn.*, 122 S. Ct. 999, 1006 (2002), as well as in the area of jurisdictional determinations such as that called for by the Tucker Acts, see *Lapides* v. *Board of Regents of the Univ. Sys. of Ga.*, 122 S. Ct. 1640, 1645 (2002) ("[J]urisdictional rules should be clear."); see also *Gonzaga*, 122 S. Ct. at 2277 ("[W]e fail to see how relations between the branches are served by having courts apply a multi-factor balancing test to pick and choose which federal requirements may be enforced by §1983 and which may not.").

The test adopted by the court of appeals in this case could scarcely be more at odds with that objective. Under the court's decision, the United States faces potential liability for breach of trust "only as to the specific parcels of trust property that the federal

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sions, and some do not even involve claims for money damages (*Pyramid Lake Paiute Tribe of Indians* v. *United States Dep't of the Navy*, 898 F.2d 1410 (9th Cir. 1990); *Northern Arapahoe Tribe* v. *Hodel*, 808 F.2d 741 (10th Cir. 1987)). None of the cases involved statutes, like the 1960 Act, that expressly reserve to the government the right to use the trust property for its own purposes. In any event, to the extent that the cases in fact suggest that a substantive right to damages against the government automatically springs from federal control or use affecting a trust resource, those decisions are fundamentally mistaken. They cannot be squared with the decisions of this Court—not to mention the text of the Tucker Acts—recognizing that a substantive right to damages from the federal government must be granted by Congress.



government has used and controlled" and—the court of appeals cryptically added—"possibly the grounds immediately surrounding such parcels." Pet. App. 18a. As a result, the determination whether (or to what extent) the government may be liable for breach of trust requires at the threshold a fact-intensive, parcel-by-parcel inquiry into "the extent that the federal government has * * * used buildings to the exclusion of the Tribe." *Ibid.* That is a highly amorphous inquiry on which to base the liability of a sovereign for money damages. More to the point, there is no evidence in the 1960 Act that Congress intended to expose the United States to potential liability in such a haphazard and changing manner.

2. The court of appeals reasoned that, since "the 1960 Act does not explicitly define the government's obligations" with respect to the trust property, it was proper "to *infer* that the government's use of any part of the property requires the government to act in accordance with the duties of a common law trustee" and, further, to *infer* that such use subjects the government to the same potential liability in money damages that would be imposed on a simple common law trustee. Pet. App. 18a (emphasis added); see *id.* at 19a (because the 1960 Act "does not explicitly define the government's obligations," we "look to the common law" to define those obligations); *id.* at 31a (under the common law, "the Tribe's claim gives rise to a cognizable claim for money damages"). That reasoning, too, is fatally flawed.

a. As discussed above, under the doctrine of sovereign immunity and the Tucker Acts (except in a suit founded upon a contract), only the Constitution, an Act of Congress, or an implementing regulation can give rise to a substantive right to money damages against

the United States. See 28 U.S.C. 1491(a)(1), 1505. See *Mitchell II*, 463 U.S. at 218 ("[F]or claims against the United States 'founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department,' a court must inquire whether *the source of substantive law* can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.") (emphasis added; internal citation omitted). Only Congress, and not the courts, may compromise the immunity of the United States from suit for money damages or, indeed, any other remedy. See *United States* v. *United States Fid. & Guar. Co.*, 309 U.S. 506, 513 (1940); *United States* v. *New York Rayon Importing Co.*, 329 U.S. 654, 660 (1947). There accordingly is no basis for finding that the United States may be liable in money damages based on resort to unanchored, judge-made principles of common law. The court of appeals' reliance on the common law in determining—and defining the scope of—the United States's potential liability in this case was therefore misplaced. See Pet. App. 18a, 26a.

Indeed, in looking to the common law of trusts to authorize the imposition of damages against the United States, the court of appeals turned the settled rule on its head. The rule established by this Court's precedents is that there is *no* substantive right to recover money damages from the United States unless a statute "in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Testan*, 424 U.S. at 402. Under the decision below, by contrast, the government's potential liability "must be determined by the general law of trusts *as modified by the 1960 Act*." Pet. App. 26a (emphasis added); see *id.* at 24a. Congress legislates with the settled understanding that the United States



is immune from suit for money damages unless it clearly expresses a contrary intent. See *Nordic Village*, 503 U.S. at 33-34. That settled and necessary understanding leaves no room for a regime under which the United States is subject to the potential liability of a private trustee under the "general law of trusts" (Pet. App. 26a), except to the extent that Congress "modifie[s]" (*ibid.*) such liability.

b. The court of appeals believed that resort to the common law was supported by decisions in Indian cases in which this Court has referred to the common law of trusts. See Pet. App. 19a (citing *Seminole Nation* v. *United States*, 316 U.S. 286, 296 (1942); *United States* v. *Mason*, 412 U.S. 391, 398 (1973); *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 14 (2001)). In those cases, however, the Court simply referred to the common law in evaluating the scope of the United States' duties in circumstances in which it was understood that the United States had assumed trust duties under a provision of positive law with respect to the particular matter at issue, and not—as the court of appeals did here—to find a right to recover damages against the United States in the absence of any statute, implementing regulation, or treaty that could fairly be interpreted as mandating the payment of compensation for damages sustained.[13]

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[13] The money claims in *Seminole Nation* were predicated on alleged violations of the United States' express promises in treaties or statutes to pay sums certain to the Tribe. 316 U.S. at 293-294. In *Mason*, the Court found no breach of any fiduciary obligation on the part of the United States, and thus had no occasion to consider the circumstances in which the United States may be held to have waived its immunity from suit for money damages for breach of trust. 412 U.S. at 400. And *Klamath Water Users* did not even involve a claim for money damages for breach

It is one thing to say that the United States, when acting as a guardian to an Indian Tribe, may assume certain duties that are analogous to those recognized at common law between a private trustee and its beneficiaries. See *Nevada* v. *United States*, 463 U.S. 110, 127 (1983). It is quite another to say that simply by declaring certain property to be held "in trust," Congress has created a cause of action against the United States for money damages for any obligations that would apply to a private trustee. That conclusion follows *a fortiori* from *Mitchell I*, where the statute at issue provided for the property to be held "in trust" for the *sole* benefit for the Indians, not, as here, subject to the right of the government to use the property for its own purposes In *Mitchell I*, the Court rejected the argument that the plaintiffs were entitled to money damages to compensate for the alleged breach of trust simply "because that remedy is available in the ordinary situation in which a trustee has violated a fiduciary duty and because without money damages [plaintiffs] would have no effective redress for breaches of trust." 445 U.S. at 541-542.

This Court has recognized that the federal government performs a role in its relations with the Indian Tribes that is different from that of a simple private trustee. See, *e.g.*, *Nevada*, 463 U.S. at 127-128. Whatever relevance an analogy to a private trustee may have in certain circumstances with respect to the Indian Tribes, the Court has never suggested that the

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of trust; it instead involved a claim for *documents* under the Freedom of Information Act. See 532 U.S. at 6. Cf. *United States* v. *Creek Nation*, 295 U.S. 103, 109 (1935) (money claims involving alleged misappropriation of property that the United States gave to the Tribe by treaty in "fee simple").



United States assumes the full potential *liability* of a common law trustee whenever it enters into a relationship with an Indian Tribe that has some characteristics of a trust. If it did, there would have been no reason for the Court to devote so much attention in *Mitchell I* and *Mitchell II* to identifying a substantive right under the particular statutes and regulations at issue in those cases to recover money damages for the asserted breaches of trust.[14]

c. The court of appeals' reliance on common law principles produced another anomaly in this case. Under the court's decision, the potential liability of the United States for millions of dollars in damages for alleged breach of trust ultimately turned not on the terms of the 1960 Act, or any other source of substantive law, but instead on a debate among the panel over whether the Tribe's interest in the Fort Apache property was better characterized as a "contingent future interest," as the panel majority believed (Pet. App. 27a-28a), or an "indefeasibly vested future interest," as the dissent argued (*id.* at 33a).

In our view, Chief Judge Mayer correctly resolved that issue. See Pet. App. 33a-36a. But in deciding whether the United States is immune from the Tribe's damages claims, there should be no need for this Court to plumb that issue of property law because—consistent with the *Mitchell* decisions and other precedents discussed above—the dispositive question in this case is whether *the statute* on which the Tribe's claim is

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[14] In a similar vein, this Court in *Nordic Village*, 503 U.S. at 39, refused to "[r]esort to the principles of trust law" to find that the United States had waived its immunity from a bankruptcy trustee's claims for money damages, and specifically indicated that "trust decisions" involving private entities "are irrelevant" when it comes to determining the liability of the *government*.

based "can fairly be interpreted as mandating compensation by the Federal Government for damages sustained." *Mitchell II*, 463 U.S. at 226. The 1960 Act contains no such mandate, and that is true quite apart from whether the Tribe's interest in the property might be a "contingent future interest," an "indefeasibly vested future interest," or some other interest. If Congress had intended to authorize the damages action in this case, it would have said so directly, and not left the matter for the courts to decide by choosing from among malleable property law concepts.

3. Relying on *Mitchell II*, the court of appeals reasoned that, "'[g]iven the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.'" Pet. App. 26a (quoting *Mitchell II*, 463 U.S. at 226). In *Mitchell II*, this Court did state that "the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust." 463 U.S. at 226.[15] But that language does not have the touchstone significance assigned to it by the court of appeals.

a. To begin with, in *Mitchell I*, this Court squarely rejected the notion—which was advanced by both the court of appeals and the dissenting Justices in *Mitchell I*—that the government's potential liability in money

[15] For support, the Court referred in a footnote to its decisions in *Seminole Nation* and *Creek Nation*, as well as certain lower court decisions. See 463 U.S. at 226 n.31. The Tribe's claim for money damages in each of those cases, however, was specifically based on the violation of a *substantive right* granted by the United States in a treaty or statute, and not on violation of mere common law duties. See note 13, *supra*.



damages "follows naturally from the existence of a trust and of fiduciary duties." 445 U.S. at 550 (dissent); see pp. 23-24, *supra*. Although the Court reached a different conclusion in *Mitchell II* with respect to whether money damages were authorized by Congress, the Court in no way repudiated the result or reasoning in *Mitchell I*, and, to the contrary, carefully distinguished *Mitchell I*. See *Mitchell II*, 463 U.S. at 217-218, 224.

b. In any event, the language quoted by the court of appeals cannot bear the weight assigned to it by the court of appeals. If, as the court below apparently believed (see Pet. App. 26a), the existence of a trust relationship alone may subject the United States to money damages for breach of that relationship, then *Mitchell I* not only is dead wrong, but there was no reason for the Court in *Mitchell II* to frame its analysis in terms of whether the statutes and regulations at issue could "fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they impose," 463 U.S. at 219; to devote five pages of its decision to a detailed review of the statutes and regulations at issue, *id.* at 219-223; and to "conclude" its decision by stating "that the statutes and regulations at issue here can fairly be interpreted as mandating compensation by the Federal Government for violations of its fiduciary responsibilities in the management of Indian property," *id.* at 228.

Indeed, the sentence in the Court's decision immediately preceding the one quoted by the court of appeals (Pet. App. 26a) begins a new paragraph as follows: "Because *the statutes and regulations at issue* in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, *they* can fairly be interpreted as mandating compensation by the Federal Gov-

ernment for the damages sustained." 463 U.S. at 226 (emphasis added). The existence of a trust relationship itself is insufficient to support a damages claim against the United States for breach of that relationship or any unstated fiduciary duties a court might believe should flow from it when, as here, the requisite statutory right is lacking.

c. Any other interpretation of *Mitchell II* is precluded by the Indian Tucker Act. That Act was enacted to ensure that Indian claimants would enjoy the *same* rights and remedies in suits against the United States as non-Indian claimants, but also left the United States with the same defenses in suits brought by Indians as it enjoys in other Tucker Act litigation. *Mitchell I*, 445 U.S. at 539; see p. 15, *supra*. In any other Tucker Act case, the mere existence of a trust relationship between the plaintiff and the United States would be insufficient to establish jurisdiction under the Tucker Act, or a substantive right to money damages against the federal government. *A fortiori*, the same is true with respect to a suit brought against the United States by an Indian Tribe under the Indian Tucker Act.[16]

Furthermore, as this Court recognized in *Mitchell I*, "[f]or claims arising *before* August 13, 1946, * * * [the Indian Claims Commission Act] did waive the sover-

[16] The Tucker Act states that, *inter alia*, the Court of Federal Claims has jurisdiction to entertain claims against the United States based on the Constitution, an Act of Congress or implementing regulation, or a contract with the United States. See 28 U.S.C. 1491(a)(1). Congress could have added to the list a provision for claims based on a trust relationship with the United States. But it did not do so in the Tucker and, perhaps even more telling, did not do so in the Indian Tucker Act. See *United States* v. *Vonn*, 122 S. Ct. 1043, 1049 (2002) ("expressing one item of [an] associated group or series excludes another left unmentioned").



eign immunity of the United States" with respect to certain "claims against the United States based on legal and equitable principles and on considerations of 'fair and honorable dealings.'" 445 U.S. at 540 n.2 (quoting 25 U.S.C. 70a (1976)). But, the Court continued, Congress did *not* intend that Act "to be a waiver of sovereign immunity for any alleged breach of trust accruing *after* August 13, 1946." *Ibid.* (emphasis added). Rather, Congress intended "'that with respect to all grievances that may arise hereafter Indians shall be treated on the same basis as other citizens of the United States in suits before the Court of Claims.'" *Ibid.* (quoting 92 Cong. Rec. 5313 (1946) (Rep. Jackson)). The court of appeals therefore erred in granting the Tribe in this case a special right to damages—in the absence of any clear statutory authorization—based on the existence of a trust relationship with the government.

d. The United States occupies a unique relationship with the Indian Tribes that has long been characterized as one of "guardianship" or "trust." See *United States* v. *Kagama*, 118 U.S. 375, 382-384 (1886); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). The United States fully accepts the implications of that relationship and the undertakings that go with it. Not all those undertakings, however, create legally enforceable *duties* on the part of the United States, much less duties that are enforceable in a suit for money damages against the United States.

This Court applies the same principles in determining whether the United States is immune from suit for money damages in a breach-of-trust action brought by an Indian Tribe as it does in determining whether the government is immune from damages actions in other contexts. See *Mitchell II*, 463 U.S. at 218-219; *Mitchell I*, 445 U.S. at 538; see also *Mottaz*, 476 U.S. at 851;

*Klamath & Moadoc Tribes of Indians* v. *United States*, 296 U.S. 244, 250, 255 (1935); *Blackfeather* v. *United States*, 190 U.S. 368, 376 (1903). A proper application of those principles results in the conclusion that the Tribe in this case has failed to state a claim for money damages. Neither the Tribe's, nor a court's, conception of enlightened Indian policy may alter that conclusion. See *Testan*, 424 U.S. at 400 ("We are not ready to tamper with the[] established principles [concerning the reach of the Tucker Act] because it might be thought that they should be responsive to a particular conception of enlightened governmental policy.").

### D. The Court Should Reaffirm That The Intent Of Congress Governs In Determining When Private Rights Or Remedies Are Established By Federal Law

This Court's Tucker Act decisions establish a clear, workable analysis under which damages are not available against the United States for a claim founded upon an Act of Congress unless the Act "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Testan*, 424 U.S. at 400; see pp. 14-18, *supra*. The court of appeals' decision in this case shifts the focus from the intent of Congress to fact-bound notions of federal control, murky concepts of common law, and open-ended principles of Indian stewardship. That approach would greatly increase the potential liability of the United States and, equally problematic, leave the government and its officials without any clear guidance as to when their actions may subject the United States, and the public's fisc, to damages claims. As the court of appeals' decision illustrates, questions concerning the existence of federal control will be litigated on a parcel-by-parcel basis, and questions concerning the contours



or application of common law doctrines will be debated by the courts and subject to appeals. That is no regime on which to rest threshold determinations affecting a sovereign's amenability to suit for money damages.

In recent cases, this Court has emphasized that it has "sworn off the habit of venturing beyond Congress's intent" when it comes to recognizing private causes of actions and the private remedies available in such actions. *Alexander*, 532 U.S. at 287. As the Court has explained, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy"—"[s]tatutory intent is determinative." *Id.* at 286. "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." *Id.* at 287. See *Gonzaga*, 122 S. Ct. at 2279 ("[I]f Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action."); *id.* at 2276-2277; *Malesko*, 122 S. Ct. at 519 n.3 ("[W]e have retreated from our previous willingness to imply a cause of action where Congress has not provided one.").

The principles of judicial restraint—and separation-of-powers concerns—underlying those decisions are all the more important when it comes to determining whether Congress has authorized a substantive right to recover money damages against the United States itself. The intent of Congress is determinative. Because Congress has not authorized the damages claim in this case, the Tribe's action should be dismissed.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 2002

Supreme Court, U.S.
FILED
SEP 18 2002
OFFICE OF THE CLERK

No. 01-1067

IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner,*

*v.*

WHITE MOUNTAIN APACHE TRIBE,

*Respondent.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

## BRIEF FOR RESPONDENT

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## QUESTION PRESENTED

In 1960, Congress conveyed to the White Mountain Apache Tribe, in trust, "all right, title and interest of the United States" in the lands and improvements included in the former Fort Apache military post, later set aside as a site for the Theodore Roosevelt School, "subject to" the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose. Act of Mar. 18, 1960, Pub.L. No. 86-392, 74 Stat. 8.

The question presented is whether the United States has a fiduciary obligation to protect and maintain the Tribe's trust property during the Secretary of Interior's exclusive use and control thereof, the breach of which would give rise to a claim for money damages in the Court of Federal Claims.

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## STATUTORY PROVISIONS INVOLVED

1. The Act of March 18, 1960, Pub. L. No. 86-392, 74 Stat. 8, states:

> [A]ll right, title and interest of the United States in and to the lands, together with the improvements thereon, included in the former Fort Apache Military Reservation, created by Executive Order of February 1, 1877, and subsequently set aside by the Act of January 24, 1923 (42 Stat. 1187), as a site for the Theodore Roosevelt School, located within the boundaries of the Fort Apache Indian Reservation, Arizona, are hereby declared to be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose.

2. Other pertinent statutory provisions — The Tucker Act, 28 U.S.C. § 1491(a), the Indian Tucker Act, 28 U.S.C. § 1505, and the Act of January 24, 1923 (42 Stat. 1187), codified at 25 U.S.C. § 277, are reproduced at Pet. App. 59a-60a.

## STATEMENT OF THE CASE

This case presents the question of whether a 1960 Act of Congress, Pub. L. No. 86-392, 74 Stat. 8 (1960) (the "1960 Act"), which declared certain lands and improvements (the "property[1]") in trust for the White Mountain Apache Tribe (the "Tribe"),[2] obligates the United States to protect and maintain the property while under the Government's exclusive use and control.

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1. The 1960 Act conveyed and declared in trust for the Tribe, equitable (beneficial) title to 7,597 acres together with the improvements thereon.

2. The Tribe is a federally recognized Indian Tribe organized under Section 16 of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 476.

## I. Historical Background

1. The Tribe has occupied the White Mountains of east central Arizona since time immemorial. It originally occupied the much larger White Mountain Indian Reservation established for the Tribe in 1871, but now occupies the Fort Apache Indian Reservation,[3] set aside for the Tribe by Executive Order on June 7, 1897 (30 Stat. 64). (R.L. 9).

In 1877, President Grant removed 7,597 acres of land by Executive Order from the Tribe's Reservation and set it aside as a military reserve [Fort Apache]. The property remained a military reserve until 1922, when it was abandoned by the Army and transferred by Act of Congress to the Secretary of Interior with authorization to establish and maintain the abandoned post as an Indian boarding school, to be known as the Theodore Roosevelt Indian School.[4] The United States held fee simple title to the property from 1877 to March 17, 1960.

On March 18, 1960, Congress declared all right, title and interest of the United States in and to the property to be held in trust by the United States for the Tribe. The 1960 Act itself was a conveyance of equitable (beneficial) title to the Tribe "subject to" the right of the Secretary of Interior to use any part of the Tribe's trust property for administrative or school purposes for

3. The Tribe has equitable (beneficial) title to the Fort Apache Indian Reservation comprised of some 1.63 million acres of trust land within the Tribe's former aboriginal territory.

4. 25 U.S.C. § 277, (42 Stat. 1187, c.a. January 24, 1923) provides:

> [T]he Secretary of the Interior is authorized to establish and maintain the former Fort Apache military post as an Indian boarding school for the purpose of carrying out treaty obligations, to be known as the Theodore Roosevelt Indian School: *Provided*, That the Fort Apache military post, and land appurtenant thereto, shall remain in the possession and custody of the Secretary of the Interior so long as they shall be required for Indian school purposes. Pet. App. 59a.

The treaty obligation referred to in the 1923 Act was to the Navajo Tribe, but that obligation was terminated in 1933 and is not a factor in this case.



as long as needed for that purpose. R.L. 3, 11. The Senate Committee on Interior and Insular Affairs valued the property conveyed in trust to the Tribe at $141,000, the improvements at $495,980, roads and streets at $160,000, and irrigation laterals and ditches at $24,372, for a total property value of $821,352. R.L. 9.[5]

On November 18, 1965, the White Mountain Apache Tribal Council adopted a Resolution requesting the Secretary "to designate Fort Apache, including the military cemetery, as a national historic site." Pet. App. 39a. Eleven years later, on October 14, 1976, the United States National Park Service designated 288 acres of the former Fort Apache military post and Theodore Roosevelt School, including the buildings and other improvements, as a National Historic Site to be known as the Fort Apache Historic District and placed it on the National Register of Historic Places. Pet. App. 4a, n.5. In 1993, the Tribe adopted a Master Plan to protect, preserve, maintain, repair, rehabilitate and restore the Fort Apache Historic District. Pet. App. 4a, n.4. The trust property is a valuable economic asset for the Tribe. Pet. App. 4a. n.4, 25a. The Tribe has plans to use the property for commercial, governmental, cultural and housing purposes, and for tourism development, as Fort Apache has become an increasingly significant tourist attraction, and the Tribe has constructed a cultural museum within its boundaries.[6] Pet. App. 4a, n.4. In September 1997, Fort Apache was placed on the "1998 List of 100 Most Endangered Monuments" by the World Monuments Watch. Pet. App. 4a, n.5, 39a. Complaint, para. 15.[7]

5. The improvements include thirty-six buildings, a military cemetery, corrals, parade ground, streets, water tanks and utility infrastructure.

6. *See* Complaint, para. 34, Br. in Opp. 2, n.2, C.A. Reply Br. 3, and Tribe's Response to Motion to Dismiss, p. 13.

7. The Government's Brief, p. 4 [hereinafter "Br."], states, citing Pet. App. 3a, that "over time in the White Mountain environment, some buildings have fallen into varying states of disrepair, and a few structures

(Cont'd)

In November 1998, the Tribe commissioned a professional engineering survey and assessment report (Schuman Report) to evaluate the condition of the subject buildings. The Schuman Report determined that it would cost the Tribe $13,973,732 to bring the buildings and other improvements into "compliance"[8] with the Secretary's own building code standards for historic buildings, the Uniform Conservation Building Code [UCBC], Pet. App. 4a (*See* Appendix A to Tribe's Complaint).

**II. History of the Litigation**

1. On March 18, 1999, the Tribe filed a Complaint for money damages against the United States in the Court of Federal Claims, alleging, *inter alia*, that the 1960 Act created a fiduciary obligation on the part of the United States to maintain, protect, repair and preserve the Tribe's property [trust corpus] during the Secretary of Interior's management, supervision, use and control of the property for administrative and school purposes, so that when the United States no longer needed the property for those purposes the Tribe would receive a protected and maintained trust corpus. (Compl. paras. 1, 32-33).

On June 1, 1999, the United States moved to dismiss the Tribe's Complaint for failure to state a claim and for lack of subject matter jurisdiction. It argued that neither the 1960 Act, nor any of the other statutes and regulations cited by the Tribe,

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(Cont'd)
have been condemned or demolished." Procedurally, this case comes to the Court from the trial court's grant of a motion to dismiss. There is nothing in the record below to suggest that the environment is the cause of the buildings' current state of disrepair.

8. The Tribe does not allege that the Government must "refurbish" (Br. 5) or alter the property for any particular Tribal use. Nor does it seek to have the Government restore the buildings to their "Old West shape" or *pre*-1960 condition. Br. 26. *See* Complaint paras. 19-20. The Government also uses the term "rebuild" in reference to the Tribe's 1993 Master Plan. Br. 5, citing Pet. App. 4a, n.4. The word "rebuild" does not appear in Pet. App. 4a, n.4. The Tribe is seeking money damages to repair, not "rebuild" Fort Apache.



could fairly be interpreted as mandating the payment of compensation by the Government for its alleged mismanagement of the Tribe's trust property. Br. 6, Pet. App. 5a. The Court of Federal Claims agreed with the Government and dismissed the Tribe's complaint for failure to state a claim. Pet. App. 5a, 38a, 56a.

The court based its dismissal on its interpretation of *United States v. Mitchell*, 445 U.S. 535, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980) ("*Mitchell I*") and *United States v. Mitchell*, 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983) ("*Mitchell II*"). The court concluded that regardless of the Government's exclusive control over the property, the 1960 Act only created a limited or "bare" trust relationship between the Government and the Tribe similar to the bare trust created by the General Allotment Act of 1887, (24 Stat. 388, 25 U.S.C. § 331 *et seq.*) that was discussed by this Court in *Mitchell I*, 445 U.S. at 535, 546, 100 S. Ct. 1349, 1354.[9] Pet. App. 48a. The court concluded that the 1960 Act was for the Government's "benefit" and not that of the Tribe, and therefore the Government's control of the Tribe's trust property was insufficient to create a fiduciary relationship. Pet. App. 47a-48a. The court also agreed [with the United States] that because the 1960 Act did not *expressly* mandate the Government to generate income from the Tribe's trust property, the Government's control alone was insufficient to create a fiduciary duty to maintain or restore the buildings and improvements, the breach of which would give rise to a money claim. Pet. App. 47a. The court also concluded, citing the *Restatement of Property*, that the Tribe's interest in the property was analogous to that of a "contingent remainderman" and therefore the Tribe's remedy, if any, was injunctive relief, not money damages. Pet. App. 53a-54a.

2.a. The Court of Appeals for the Federal Circuit reversed and remanded. Pet. App. 1a-32a. The court found that the 1960

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9. None of the Tribe's reservation trust lands have ever been subjected to the General Allotment Act, 25 U.S.C. § 331, *et seq.*

Act clearly created a trust.[10] It also concluded that the United States had a fiduciary obligation to the Tribe to protect and preserve the Tribe's trust property from "loss, damage or diminution in value" while under the Government's exclusive use and control and not only where a statute expressly or impliedly required the Government to generate income from Tribal trust resources, monies or property. *Id.* 14a-15a, 18a-25a. The court found that "[t]he language of *Mitchell II* makes quite clear that control alone is sufficient to create a fiduciary relationship" and that

> to the extent that the government has actively used any part of the Tribe's trust property, and has done so in a manner where its control over the buildings it occupies is *essentially exclusive*, the portions of the property that have been so used can no longer be classified as being held in merely a '*bare trust*' under *Mitchell I*.

*Id.* 15a-17a, 31a. (emphasis added.) The court concluded that the Government had a fiduciary obligation to act reasonably to maintain and repair the trust property under its exclusive use and control. The court was also particularly aware of conflicts of interest, observing that it must be "particularly careful in scrutinizing the Government's actions" as the Government's statutory right to use the Tribe's trust property creates a "conflict of interest as to the fulfillment of that fiduciary obligation." *Id.* 23a. The court found that notwithstanding the Government's right to use the Tribe's property, the United States as trustee is required "to act with due regard" to the interests of the Tribe in the trust property, citing the *Restatement (Second) of Trusts*

10. "[A]ll of the necessary elements of a common law trust are present: a trustee (the United States), a beneficiary (the Tribe) and a trust corpus (the land and improvements held in trust)." Pet. App. 10a-11a. The court noted that "[b]oth the Tribe and the United States in their briefs agree that the 1960 Act creates a 'trust,'" but that "Inexplicably, at oral argument the Government reversed its position by arguing that a beneficial interest in the property had not yet passed to the Tribe." Pet. App. 10a-11a. n.7.



§ 232 (1959). *Id.* 23a-24a.[11] The court observed that it was well-established that once a fiduciary obligation exists by virtue of a governing statute, in this case the 1960 Act, courts may look to the common law of trusts [*Restatement (Second) of Trusts*] to help define the *nature* of that obligation, citing *Mitchell II*, 463 U.S. at 226, 103 S. Ct. 2961 (use of *Restatement (Second) of Trust* and secondary authorities). *Id.* 19a.

The court held that the court of federal claims must assume that the purpose of the 1960 Act was entirely economic and thus the "reasonableness" of the Government's actions are to be "measured by the potential loss of economic value" to the Tribe. *Id.* 24a-25a. The court concluded that given the existence of a trust relationship and fiduciary obligations, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties, as it is well-established that a trustee is accountable in damages for breaches of trust, citing *Mitchell II*, 463 U.S. at 226, 103 S. Ct. 2961 and the *Restatement of Trusts*. *Id.* 26a. Thus, if a breach of trust is proven by the Tribe, the United States, as trustee, could be chargeable with a loss or depreciation in value of the trust estate resulting from the breach of trust. *Id.* 26a.

The court of appeals rejected the court of federal claims' application of the *Restatement (First) of the Law of Property* (1936) to the Tribe's claim, observing that 'comments' to the *Restatement of Property* itself make it clear that the Restatement of Property is *not* applicable to a trust situation. *Id.* 27a. The court also concluded that even if the *Restatement of Property* was applicable there is nothing contingent about the Tribe's future interest in the trust property and that the Tribe's interest is "better described as an indefeasibly vested future interest."

11. Also citing, *Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S. Ct. 1049, 86 L. Ed. 1480 (1942) (citing *Restatement (First) of Trust*); *United States v. Mason*, 412 U.S. 391, 398, 93 S. Ct. 2202 (1973) (relying on secondary authority); *Department of Interior v. Klamath Water Users Protective Ass'n.*, 532 U.S. 1, 6, 121 S. Ct. 1060, 1068, 149 L. Ed. 2d 87 (U.S. 2001) (citing *Restatement (Second) of Trusts*). Pet. App. 19a.

*Id.* 28a. Therefore, "the more nearly analogous provisions" were Sections 134 and 187 of the *Restatement (First) of Property* (1936) and "[u]nder those sections, a beneficiary has an immediate claim for money damages for any alleged failure to maintain and repair buildings." *Id.* 28a-30a.

2.b. Chief Judge Mayer dissented because in his view, "the 1960 Act did not impose a fiduciary duty on the Government and because the Tribe does not hold an indefeasibly vested future interest in the Fort Apache land and buildings." Pet. App. 33a. He observed that "[w]e held in *Brown v. United States*, 86 F.3d 1554, 1560 (Fed. Cir. 1996), that the fiduciary duty need *not* be explicit in the statute or regulation, but the government *must take on or have control or supervision of Tribal monies or property*." (Emphasis added). *Id.* 33a.[12] Chief Judge Mayer concluded that the 1960 Act could not impose a fiduciary obligation on the United States because the 1960 Act "carves" out of the trust the Government's right to use the Tribe's property. *Id.* 33a-34a. Therefore, the fiduciary obligation would never attach during the Government's "condition precedent" use of the property. *Id.* 35a. He further found that the Tribe's interest in the trust property was a "contingent future interest" only and there was no certainty it would ever vest in the Tribe. *Id.* 34a-35a. *Cf.* the panel majority's comments, *Id.* 30a, n.15.

## SUMMARY OF ARGUMENT

A. The Government's fiduciary obligation to protect and maintain the Tribe's trust property while under the Secretary of Interior's exclusive control and use arises from and is firmly anchored in the 1960 Act. The Government's breach of its fiduciary obligation to the Tribe gives rise to a claim for money

12. Chief Judge Mayer also dissented in *Brown v. United States*, 86 F.3d 1554, 1565-66 (1996) because he disagreed that the Indian leasing statutes and regulations at issue amounted to "elaborate control" and that the allottees were "essentially powerless." *Id.* He found the opposite with respect to the Secretary's [of Interior] control over rights of way [25 U.S.C. §§ 323-325 (1982) and 25 C.F.R. Part 169], *Id.* at 1565, and concluded that their [allottees] only recourse was to hold the Government answerable to compensation. *Id.* at 1565-66.



damages in the Court of Federal Claims. The Tucker Act, 28 U.S.C. § 1491(a), and the Indian Tucker Act, 28 U.S.C. § 1505, waive the sovereign immunity of the United States and grant jurisdiction in the U.S. Court of Federal Claims for money damage claims against the United States. The Government's argument, that breach of trust claims are not within the purview of the Tucker Act, is contrary to Congress' purpose and intent in enacting § 1505 and represents a *sub rosa* attack on the scope of the fiduciary relationship and trust obligations of the United States to Indian people. Br. 40, n.16. In effect, the Government is asking that this Court ignore its longstanding recognition of "the distinctive obligation of trust incumbent upon the Government" in its dealings with Indian Tribes. *Nevada v. United States*, 463 U.S. 110, 127 (1983), citing *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).

This Court's decisions in *Mitchell I* and in *Mitchell II* struck an appropriate balance between trust accountability and judicial intrusion into executive affairs. Since then, other federal courts have applied the principles enunciated in the *Mitchell* decisions to determine the Federal government's enforceable fiduciary obligations. These court decisions are characterized in each case by an essentially *ad hoc* textual and contextual inquiry and a careful examination and weighing of all the relevant circumstances to determine if the applicable statutory or other source of the claimed substantive right grants a right to recovery of money damages against the United States either "expressly or by implication." *United States v. Testan*, 424 U.S. 392, at 400, 96 S. Ct. at 954 (quoting *Eastport S.S. Corp. v. United States*, 178 Ct.Cl. 599, 372 F.2d 1002, 1007 (1967). Thus, the existence *vel non* of an enforceable trust–fiduciary relationship is inferred by courts from the nature of the transaction or activity involved, that is, whether the Government in the case at hand has taken on, supervised managed *or* controlled Indian monies or properties. *See Navajo Tribe of Indians*, 624 F.2d 981, 987 (1980), cited with approval in *Mitchell II*, 463 U.S. at 225, 103 S. Ct. at 2972.

This Court in *Mitchell II* clarified that the Tucker Act provides the necessary waiver of sovereign immunity and consent to suit by the United States, holding that "there is simply no question that the Tucker Act provides the United States' consent to suit for claims founded upon statutes or regulations that create substantive rights to money damages." *Mitchell II*, 463 U.S. 206, at 218, *see also* 212, 215-216, 219. The 1960 Act which expressly created a "trust," need not explicitly authorize a suit for damages for breach of trust any more than a contract between the United States and a private entity must explicitly authorize a suit for damages for breach of contract. The Tribe is entitled to receive the benefit of the valuable property right that Congress expressly conveyed in trust to the Tribe. The Tribe's right to the property is not an implied right — it is an express right conferred by Congress in the exercise of its plenary power over Indian affairs and property. The express trust created by Congress for the benefit of the Tribe necessarily includes an implied remedy for breach of trust duties incumbent upon the Government as soon as it managed, supervised, controlled and took on physical occupation of the Tribe's trust property for the limited uses allowed it by the 1960 Act.

B. The plain text of the 1960 Act, as confirmed by its legislative history, unequivocally conveys all right, title, and interest of the United States in and to the property in trust for the Tribe, save bare legal title. Congress' purposive intent in the 1960 Act was to convey and recognize a protected, compensable and presently vested property interest in the Tribe and only to reserve a limited right, akin to a defeasible easement in the Government. The United States, as trustee and guardian of the Tribe's trust property, has a fiduciary obligation to protect the Tribe's property while under its exclusive control. As an active, *in situs* trustee, the Government is also inherently restrained from treating the Tribe's property as its own. This Court has held that where the Federal Government takes on or has *control or supervision* over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise)



even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection. *Mitchell II*, 463 U.S. at 225, 103 S. Ct. 2961.

Contrary to the plain text and legislative history of the 1960 Act, as well as overwhelming case authority, the Government asserted during oral argument in the court of appeals below that it had the discretionary right to dynamite the Tribe's buildings to the ground without recourse by the Tribe. Opp. Br. 28. n.35. The Government's asserted right to do so is based on a specious argument that "beneficial title[13] has not even passed as to any of those portions of the site that are retained for exclusive use by the United States," because the 1960 Act "subject[s]," and thus subordinates Congress' conveyance of beneficial title in trust to the Tribe to the Government's "open-ended" use right. See Pet. App. 10a. n.7, Br. 24-25. Without citation to any controlling authority, the Government argues it thus has no enforceable fiduciary obligation to protect, much less preserve or maintain, the Tribe's trust property during the Government's physical occupation, control and use thereof. In sum, the Government's view is that the 1960 Act represents "a favor conferred, rather than a right acknowledged." *Worcester v. Georgia*, 6 Pet. 515, 582 (1832).

The Government's interpretation of the 1960 Act leads to an irreconcilable inconsistency within the 1960 Act and, if adopted, results in a patently absurd and unjust consequence contrary to Congress' purposive and beneficent intent in the 1960 Act. Absent clear and plain language to the contrary in the 1960 Act, it must be presumed that Congress did not intend, *sub silentio*, to undo its intent to convey a protected property right in trust to the Tribe by authorizing a back-handed right in the Secretary to demolish the Tribe's trust property by design or neglect. Even if the 1960 Act's silence about commonly understood maintenance and protection duties of an active, *in situs* trustee could be construed as an ambiguity, statutes for

13. Opp. Br. 28, n.35 (Tr. December 7, 2000, p. 23).

the benefit of Indians "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Doyon Limited v. United States*, 214 F.3d 1309, 1314 (Fed. Cir. 2000) quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985).

C. The Government's defeasible right to use the Tribe's trust property does not relieve it from its fiduciary obligation to protect and maintain the Tribe's property while under its exclusive, physical control. Thus, the court of appeals' application of the common law of trusts, within the context of the 1960 Act, to determine the *nature* of the Government's trust relationship and its fiduciary obligations (duty to protect and maintain) was both practical and principled and in conformity with this Court's trust obligation analysis in *Mitchell I* and *Mitchell II*.

The 1960 Act's silence about money damages is no bar to the Tribe's claim. The property Congress conveyed in trust for the Tribe has a monetary value. In 1960 Congress valued the property at $821,352. R. L. 9, n.5, *supra*. The replacement cost of the buildings alone would cost the Tribe millions of dollars. There is no doubt about the "monetary character" of the property that Congress conveyed in trust to the Tribe. As the designated beneficiary of a trust established by Congress, the Tribe has the right as an injured beneficiary to sue its trustee for damages resulting from breach of its trustee's fiduciary obligations. *Mitchell II*, 463 U.S. at 226, n.31 (citations omitted). A money damage remedy is also consistent with this Court's "well settled" rule that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done," *Barnes v. Gorman*, 536 U.S. __ (2002) at 7, quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946). A money damage remedy also furthers Congress' purposive intent in the 1960 Act, which was to convey a protected, compensable and valuable property right to the Tribe. The court of appeals properly interpreted the 1960 Act. Its decision does not represent a



deviation of, or an extension of *Mitchell II*, or "a significant doctrinal development in the Federal Circuit's own decisions" as claimed by the Government. Pet. 22, n.10.

## ARGUMENT

### A. The Indian Tucker Act waives the sovereign immunity of the United States from suit for Tribal claims based on breach of trust or fiduciary obligations that arise under the laws of the United States.

In 1946, Congress enacted the Indian Claims Commission Act (ICCA), the purpose of which was to adjudicate all Indian claims arising on or before August 13, 1946, the date of its enactment.[14] For Tribal claims arising *after that date*, consent was given to suit in the Court of Claims by Section 24 of the ICCA, now partially codified as 28 U.S.C § 1505, and referred to as the Indian Tucker Act. Pet. App. 59a-60a. The purpose of Section 24 was to provide Tribal claimants the same access to the Court of Claims provided to individual claimants by 28 U.S.C. § 1491. *Mitchell II*, 463 U.S. 206, 212 n.8, 214.

When Congress enacted the 1946 Indian Claims Commission Act, it expressly presumed and intended that future claims filed by Tribes under Section 24 would or could be based on the Government's trust mismanagement or breach of its fiduciary obligations to Indian Tribes. Congressman Henry M. Jackson, House sponsor of the bill that became § 1505,

14. The Indian Claims Commission Act was triggered by Congress' concern about the "vast and growing burden" placed upon Congress by the volume of claims filed by Tribes seeking special jurisdictional acts. It concluded that the "pernicious effect of long delay and the denial of justice" in the special jurisdictional act system had to be stopped. *See* H.R. Rep. No. 1466, 79th Cong., 1st Sess. pg. 6.

Between 1886 and 1946, Congress enacted well over 100 special jurisdictional statutes allowing Tribes to sue the United States for damages. A compilation of most of these acts may be found in Felix S. Cohen's *Handbook of Federal Indian Law*, pp. 374-376 (Government Printing Office, 1942). For a more detailed history of the Tucker Acts, 28 U.S.C. §§ 1491 and 1505, *see Mitchell II*, 463 U.S. 206, 212-215 (1983).

stated the following about the bill's intent regarding trust mismanagement:

> The Interior Department itself suggested that it ought not be in a position where its employees can *mishandle funds and lands of a national trusteeship* without complete accountability . . . [L]et us see that the Indians have their fair day in court so that they can call the various Government agencies to account on the *obligations that the Federal Government assumed*.

92 Cong. Rec. 5312 (1946). (Emphasis added.)[15] A proviso was inserted in Section 24 of the ICCA bill, which stated that "[n]othing contained in this section shall be construed as *altering the fiduciary or other relations* between the United States and the several Indian Tribes, bands or groups."[16] The 1949

15. Congressman Jackson urged passage of the bill, "so it will never again be necessary to pass special Indian jurisdictional acts in order to permit the Indians to secure a court adjudication on any *misappropriations of Indian funds or of any other Indian property by federal officials that might occur in the future*." 92 Cong. Rec. 5313 (1946).

The House Report expressed this same Congressional purpose in even stronger terms: "If we fail to meet these obligations by denying access to the courts *when trust funds have been improperly dissipated or other fiduciary duties* have been violated, we compromise the national honor of the United States." H.R. Rep. No. 1466, 79th Cong., 1st Sess. 4 (1945), reprinted in 1946 U.S. Code Cong. & Ad. News 1347, 1351. (Emphasis added.)

16. See House Reports, 79th Cong. 2d Sess. (January 14 – August 2, 1946) misc. vol. 5 at p. 6, Conference Report to accompany H.R. 4497, creating the Indian Claims Commission. An Amendment [No. 6] to the bill passed by the House provided that in the determination of any claim by the Commission, the Court *should apply to the United States the same principles of law as would be applied to an ordinary fiduciary*. The Senate struck this provision as part of its Amendment No. 6 as unnecessary:

> [T]he conferees agreed to the elimination of this provision because it is now well settled that *without express*

(Cont'd)



recodification of section 24 [§ 1505] omitted this proviso as unnecessary surplusage.[17] *See also Klamath & Modoc Tribes & Yahoo Skin Band of Snake Indians v. United States*, 174 Ct. Cl. 483, 491 (1966), where the court observed:

> [T]he purpose of the omitted language was to make it clear that the new legislation did not discharge or cancel any *fiduciary obligations* of the United States and to vouchsafe the right of the Indians to sue in this court . . . . to recover money damages that result from the Government's breach of any such *obligations* that arise under "the Constitution, laws, treaties of the United States, or Executive Orders of the President."

(emphasis added.)

The Government's Brief ignores the legislative history of § 1505, and argues that because the Tucker Acts do not list a provision for "claims based on a trust relationship," such claims do not come within the purview of either § 1491 or § 1505. Br. 40. n.16. Ironically, the part of Section 24 omitted in the 1949 recodification as "unnecessary surplusage" had originally

(Cont'd)

> *language the United States owes a very high degree of fiduciary duty to Indian Tribes*, and the bill, by Section 24 provides — "*that nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian Tribes, bands, or groups*."

Cong. Rep. July 27, 1946. H.R. No. 2693. (Emphasis added.) Felix S. Cohen, Assistant Solicitor, representing the Department of Interior, explained: "By way of precaution against misconstruction a proviso has been inserted at the end of the section [24] for the purpose of indicating that the *substantive* relations between the United States and the several Tribes are not intended to be altered." Hearings Comm. Ind. Affairs, 79th Cong. 1st Sess. on H.R. 1198 and H.R. 1341, 127, 130-131 (1945). (emphasis added).

17. *See* 28 U.S.C. § `505, U.S. Code Service History; and Ancillary Laws and Directives, notes, prior law and revision. 2 U.S. Cong. Serv. 1269 (1949).

been inserted with the support of the Department of the Interior to guard against such misconstruction. In support of its astonishing argument, the Government invokes the statutory canon that expressing one item of a commonly associated group or series excludes another left unmentioned (*exclusius unius est exclusio alterius*) and cites *United States v. Vonn*, 122 S. Ct. 1043, 1049 (2002), a criminal procedure case, as authority. Br. 40, n.16. More apropos is this Court's statement in the same case that, "at best, the canon . . . . is only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives," and that "[a]n inference drawn from Congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of Congressional intent." *Id.* at 1049-1050, citing *Burns v. United States*, 501 U.S. 129, 136, 111 S. Ct. 2182, 115 L. Ed. 2d 123 (1991). Even more on point is this Court's past admonishment that a "canon of construction is not a license to disregard clear expressions of . . . . Congressional intent." *Rice v. Rehner*, 463 U.S. 713, 733 (1983).

The Government deduces that because non-Indians cannot base a substantive right to money damages on the "mere existence of a trust relationship," "*A fortiori*, the same is true with respect to a suit . . . . by an Indian Tribe under the Indian Tucker Act." Br. 40. The Government confuses equal *access* under the Tucker Acts for Indians and non-Indians with the substantive rights that may arise under the Constitution, laws or treaties of the United States or Executive Orders of the President. Placed side by side, § 1491 and § 1505 are different. Non-Indian claimants obviously do not have claims arising from "treaties of the United States." Although Congress' intent and purpose in the Indian Tucker Act was to provide Indian Tribes the same access to the Federal Claims Court as non-Indian claimants have under § 1491, neither the claims nor the Federal statutes or regulations which give rise to the claimed enforceable substantive rights have to be identical. Thus, most Indian claims to recover money damages are based upon an alleged breach of



a fiduciary obligation that arises under the Constitution, laws, treaties of the United States or Executive Orders of the President, while most, if not all, non-Indian claims, arise from contracts, regulations or Acts of Congress not based on breach of trust. The Government's interpretation of the Indian Tucker Act would have this Court ignore the *sui generis* fiduciary relationship between the United States and Indian Tribes and fiduciary obligations that arise under the laws of the United States, and make Indian Tucker Act claims "the same" as non-Indian Tucker Act claims. The Government's attempt to restrict what kind of a claim an Indian Tribe can file against the United States is contrary to Congress' purposive intent in § 1505,[18] this Court's decision in *Mitchell II*, and the Federal Indian law jurisprudence of this Court as recently confirmed in *Department of Interior v. Klamath Water Users*, 121 S. Ct. 1060 (2001).

> The existence of a trust obligation is not, of course, in question, see *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707, 107 S. Ct. 1487, 94 L. Ed. 2d 704 (1987); *United States v. Mitchell*, 463 U.S. 206, 225, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983); *Seminole Nation v. United States*, 316 U.S. 286, 296-297, 62 S. Ct. 1049, 86 L. Ed. 1480 (1942). The fiduciary relationship has been described as "one of the primary cornerstones of Indian law," F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 221, and has been compared to one existing under a

18. The canons of statutory interpretation require the Court to consider first the text of the Act and then any binding authority interpreting the text. *See* 2.A. Norman J. Singer, Sutherland Statutory Construction, § 46.01, at 113-129 (6th ed. 2000) (Singer); *Consumer Product Safety Comm'n. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself."). The second step of statutory construction, which is to be employed only in the case of ambiguity in the text of the statute and in the absence of binding interpretative authority, is to consider whether guidance is afforded by relevant legislative history. *See* 2A Singer, *supra*, § 48.01 at 411-415.

> common law trust, with the United States as trustee, the Indian Tribe or individuals as beneficiaries, and the *property and natural resources managed by the United States as the trust corpus*. *See, e.g., Mitchell, supra*, at 225, 103 S. Ct. 2961.

*Id.* at 1067 (emphasis added).

**B. The 1960 Act conveyed in trust for the Tribe a presently vested and protected property right with full equitable title in the subject property.**

The objective of statutory analysis is to determine the intent of Congress. *In Re Portola Packaging, Inc.*, 110 F.3d 786, 788 (Fed. Cir. 1997). This analysis begins with the language of the statute at issue, *Toib v. Radloff*, 501 U.S. 157, 162, 111 S. Ct. 2197, 115 L. Ed. 2d 145 (1991),[19] and "[t]he design of the statute as a whole and [to] its object and policy," *Crandon v. United States*, 494 U.S. 152, 158, 110 S. Ct. 997, 108 L. Ed. 2d 132 (1990). It is a fundamental rule of statutory construction that all words in a statute are to be given meaning. *See* 2A Singer, *supra*, § 46.06 at 181-196 ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.")[20]

The 1960 Act is written in unmistakable present tense terms. It states that "[A]ll right, title and interest of the United States" [in the lands and improvements] "are hereby declared to be held in trust," for the White Mountain Apache Tribe. *See United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a

19. *See also Group Life and Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979) (The language of the Act is the starting point for all statutory interpretation); *Teamsters v. Daniel*, 439 U.S. 551, 558 (1979); *Williams v. Taylor*, 529 U.S. 420, 431 (2000).

20. *See also Chisom v. Roemer*, 501 U.S. 380; 111 S. Ct. 2354; 115 L. Ed. 2d 348 (1991): ". . . . In the political process, the statute does not create two . . . distinct rights. . . . It would distort the plain meaning of the sentence to substitute the word 'or' . . . .", and *Bailey v. United States*, 516 U.S. 137, 145, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995) (In construing a statute a court must give effect and meaning to all of its terms, if possible.)



*verb tense* is significant in construing statutes.") (emphasis added). *See also Otte v. United States*, 419 U.S. 43, 49-50 (1974); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 63-64, n.4 (1987). The Government's paraphrase of the 1960 Act in its Question Presented reads, "Congress declared that a former military post in Arizona *would* be held by the United States in trust for the [Tribe]," suggesting a future interest in the property rather than a presently vested trust with full equitable title. Br. (I). (emphasis added.) The Tribe objected to the Government's verb tense change in its Opposition to Petition for Certiorari and continues that objection here. Opp. Br. 1. n.1.

In error, the court of federal claims ignored the present-tense language of the 1960 Act and characterized the Tribe's property right as a "contingent remainderman," a view now rallied behind by the United States. The court of appeals reversed and found there was nothing "future" or "contingent" about Congress' declaration of trust and conveyance to the Tribe of equitable title to the property. It concluded that the Tribe's interest in the property was better described as an "indefeasibly vested future interest" and the Government's interest "as one akin to a present life estate in the trust property."[21] Pet. App. 28a. The court did not find as the law of the case that the *Restatement (First) of Property* was the correct source of law for trust questions. Pet. App. 30a. n.15. It observed, in fact, that the *Restatement (First) of the Law of Property* (1936) had no application because the *Restatement* itself was clear that it did *not* apply to trust situations, citing the *Restatement (First) of the Law of Property* (1936), note to ch. 13, at 753 ("when the person seeking protection has a future beneficial interest under a trust, the protections available to him . . . are a part of the law of trust and outside the scope of this Restatement.").

21. Note: the Government's Br. 37, inadvertently, but incorrectly states that the majority panel believed the Tribe's interest in the property was a "contingent future interest" and that the dissent argued it was an "indefeasibly vested future interest." It is the reverse. *See* Pet. App. 27a-28a, and 33a (dissent).

Pet. App. 27a. Thus, although the court correctly described the Tribe's title to the property as "indefeasibly vested," its "future interest" analogy is more applicable to the postponement of a beneficiary's enjoyment under a trust than to the Tribe's property right. Pet. App. 28a-29a. The text of the 1960 Act itself, as discussed below, defines the appropriate application of property and trust law in this case.

1. ***The Secretary's defeasible reserved use right in the 1960 Act is not a "carving out" or an "exception" to the property that Congress conveyed in trust to the Tribe.***

The property conveyance words used in the 1960 Act are well defined legal terms. The "carved out" metaphor used throughout the Government's brief to describe the Government's reserved right has no such lineage. The Government argues that because the Secretary's reserved right was "carved out" of the property, beneficial title to the property has not yet been transferred to the Tribe. The Government's "carving out" metaphor is tantamount to an "exception" in real property conveyance terms. An interest in real property is defined by the metes and bounds that describes its geographic dimensions and by the term of years that describe the temporal aspect of the owner's interest. *Restatement of Property* §§ 7-9 (1936). An "exception" is the withholding of title to a portion of the legal description of property conveyed by the grantor, in this case, the United States, which would otherwise pass to the grantee, in this case, the Tribe.[22] The 1960 Act did not "carve out," withdraw, or "except" from the conveyed property's legal description any land and improvements for Secretarial use. Rather, Congress reserved for the Secretary a limited defeasible right to use the Tribe's property *after* it had conveyed "all right,

22. *See* Black's Law Dictionary 4th Ed. (1951) at 667-668 "exception in deeds or conveyances"; *see also Moore v. Davis*, 273 Ky. 838, 117 SW.2d 1033, 1035 (1938); *Houghtaling v. Stoothoff*, 170 Misc. 773, 12 N.Y.S.2d 207, 210 (1939); *Lewis v. Standard Oil Co. of California*, C.C.A.Cal., 88 F.2d 512, 514 (1937). Tiffany, Law of Real Property (3rd ed.) §§ 972-973.



title and interest of the United States, in and to the lands, together with the improvements[23] thereon, in trust for the Tribe. This is confirmed by the 1960 Act's legislative history which is replete with references to "proviso," and the "reserved right" of the Secretary.[24] R.L.-9, 11, 15, 16. Rather, the "subject to" proviso created a new interest in the Tribe's trust property similar to that of a defeasible use easement or servitude. A reserved right can only be created by a "reservation" of rights, not by an "exception." Moreover, the word "except" cannot create a servitude as one cannot hold an easement in one's own land.[25]

23. Equitable title to the "improvements" was of course conveyed to the Tribe by the 1960 Act, and would have been even if the Act had been silent in that regard. *See Banner v. United States*, 238 F.3d 1348 at 1356 (Fed. Cir. 2001) (Held: "Under the general law of improvements, it is well settled that improvements to realty are considered part of the real property and ownership of the improvements follows title to the land,") *citing in support, inter alia, In Re Chicago, Rock Island & Pac. RR Co.*, 753 F.2d 56, 58 (7th Cir. 1985) and Tiffany, Real Property § 231, pp. 535-36 (1912) (other citations omitted).

24. Black's Law Dictionary, *Id.* at 668:

> A reservation does not affect the description of the property conveyed, but retains to the grantor some right upon the property, as an easement, whereas an exception operates upon the description and withdraws from the description the excepted property. *Moore v. Davis*, 273 Ky. 838, 117 S.W.2d 1033, 1035. A "reservation" is always of something taken back out of that which is clearly granted, while an "exception" is of some part of the estate not granted at all.

*Houghtaling v. Stoothoff*, 170 Misc. 773, 12 N.Y.S.2d 207, 210 (1939); *Lewis v. Standard Oil Co. of California*, C.C.A.Cal., 88 F.2d 512, 514 (1937).

25. *See* Powell on Real Property § 34.02[1] at 34-10; and generally "The Law of Easements and Licenses and Land," John W. Bruce & James W. Ely, Jr. (Warren, Gorham and LaMonte) § 3.05 [1], a grantor who wishes to retain an easement should use the word "reserve" not "exception," because "reservation" implies the creation of a new interest in the grantor. n.1 citing *Bigelow & Madden*, "Exception and Reservation of easements," 38 Harv. L. Rev. 180 (1924); *Creation of*

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Accordingly, the Secretary's reserved use right in the Tribe's property is *not* and cannot be an "estate in land" such as a fee simple determinable estate or life estate in the property. *See Powell on Real Property*, § 13.05, 13-34, 13-35, n.4 and § 34.02 [1], 34-10; Restatement of Property § 44.[26]

**2. *"Subject To"***

The 1960 Act provides that the Tribe's property be "subject to" use by the Secretary of Interior, but only for administrative or school purposes. The term "subject to" as used in the 1960 Act has been defined to mean "subordinate or subservient to," or "governed" or "affected by" or "provided that" and has been held sufficient to reserve an easement, although the term "reserved" is preferred.[27] Although the 1960 Act's reserved use right proviso could, if exercised by the Secretary of Interior, *postpone* the Tribe's enjoyment of its trust property, the Tribe's beneficial interest in the property was nevertheless created by Congress *at the time* of its declaration "in trust" [March 18, 1960]. It is well established that a promise to create or convey a trust in the future is distinguishable from the present creation

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*Easements by Exception*, 32 W. Va. L. Q. 33 (1925) (reviewing decisions in Massachusetts). *See also* definition of "reservation," Black's Law Dictionary, *supra* at 1472 (reservation is a clause in a conveyance by which the grantor creates, and then reserves to himself, some right or interest in the estate granted).

26. The 1960 Act divested the United States of "all right, title and interest" in the property. The Government accordingly has no ownership or "estate in land" in the Tribe's trust property, save bare legal title and a reserved, defeasible use easement. Where a Tribe has full beneficial title, the United States only has naked fee and transfers no beneficial interest by conveyance thereof, *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877) (right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee).

27. Black's Law Dictionary, *supra,* at 1594; *see* Bruce & Ely, *supra* § 3.05 [3], 3-13, n.15, citing *City of Phoenix v. Kennedy*, 138 Ariz. 406, 408, 675 P.2d 293, 295 (Az. Ct. App. 1983) (Held: reservation of right-of-way easement found where 1955 federal land grant contained "subject to" language.)



of a trust with a *postponement* of enjoyment by the beneficiary. Thus, it is immaterial that no one but the settlor [in this instance, the United States] has an interest presently enjoyable and that the interests of the Tribe as trust beneficiary is postponed in enjoyment. The interests are nevertheless created at the time of the declaration of trust. *Scott on Trusts*, by William H. Fratcher, § 26 at 288.

The "subject to" proviso in the 1960 Act was inserted at the request of the Department of the Interior as an amendment to the bill [S.2268],

> "[T]his change is a technical one. The bill itself is a *conveyance of the equitable title*, and in conveyancing terms *the grant of title* should be made *subject to the right of the United States* to use the property for school and administrative purposes. This reserved right applies to any part of the land and improvements, and not merely to the lands and improvements that are presently in use. This will provide flexibility and permit modifications to be made in present administrative use *without seeking new legislation*.

(Emphasis added.)[28] Indian Reservations in Arizona and New Mexico cannot be added to without an Act of Congress.[29] An "exception" or "carving out" of property Congress conveyed to the Tribe for Secretarial use would require future Congressional legislation to transfer each parcel of property (with its own legal description) to the Tribe after the Secretary no longer needed each such parcel of property for its administrative or school purposes. The "subject to" amendment made such legislation unnecessary as the 1960 Act conveyed equitable title to the entire property to the Tribe. In summary,

28. *See* Senate Report No. 671 [S.2268], 86th Cong., 1st Session, Calendar No. 677, Report of Roger Ernst, Assistant Secretary of the Interior, R.L. 11.

29. *See* Act of May 25, 1918, ch. 86, § 2, 40 Stat. 570 (1918), codified at 25 U.S.C. § 211 (1958).

the 1960 Act's "subject to" proviso only reserved in the Secretary a "right of use" in the Tribe's trust property, *not* retention of ownership of the property held in trust. *See, e.g., Pueblo of Santa Ana v. United States*, 214 F.3d 1338, 1340-41, 1342 (2000) (Held: "subject to" provision in Congress' land conveyance to Tribe did not convey ownership of mineral rights to United States, only a use or access easement). Discussed *infra.*, pp. 25-26.

**3. *"For As Long As"***

Pursuant to the 1960 Act, the Secretary has a limited use right in the Tribe's trust property "for as long as" the Secretary needs the property for administrative or school purposes.[30] Thus, the Secretary's use easement was made defeasible. A defeasible easement or interest in land created for a particular purpose expires when the particular purpose ends or when the underlying need no longer exists. *See B*ruce & Ely, *Law of Easements and Licenses in Land*, § 10:8 and 10:9, use of term "so long as" found to be determinable easement, *Id.* § 10.3, 10-7, n.8. *See* an analogous application in the law of property where words such as "so long as," "until," or "during" are appropriate to create a fee simple determinable "estate" in land. *Oldfield v. Stoeco Homes, Inc.*, 26 N.J. 246, 139 A.2d 291, 296 (1958).

30. Few of the thirty-six buildings are currently needed by the Secretary for administrative or school purposes. *See e.g.*, Government's Mot. to Dismiss at 5: "[T]he Government no longer uses many of the buildings and improvements for school or administrative purposes." *See also* Federal Circuit opinion, "According to the parties, the government has offered to terminate its trusteeship over an unspecified number of the buildings and to transfer control of them to the Tribe." Pet. App. 3a. "[T]he future of the school as a viable institution is apparently under review." Pet. App. 3a, citing *White Mountain Apache Tribe v. United States*, 46 Fed. Cl. 20, 22, n.2.



**4. *The Government's interpretation of the "subject to" proviso in the 1960 Act would lead to a patently absurd and unjust consequence***

The Government's claim of an "open-ended right"[31] to destroy[32] the Tribe's valuable, vested trust property cannot be imputed from the "subject to" proviso in the 1960 Act which only reserved and authorized in the Government a defeasible use of the Tribe's trust property and one limited to administrative or school purposes. A recent case decided by the Federal Circuit Court of Appeals involving similar statutory language is instructive. In *Pueblo of Santa Ana v. United States*, 214 F.3d 1338, 1340-41, 1342 (2000), a 1978 Act of Congress declared certain lands, *including minerals thereon*, to be held in trust by the United States for the benefit and use of the Pueblo of Santa Ana. Another section of the 1978 Act provided that these same lands would continue to be "*subject to*" a previous Public Land Order, meaning that the mineral rights in the Pueblo's land would be subject to use by the United States for the Jemez Canyon Dam and Reservoir Project until such lands, or any portion thereof, were determined by the Secretary of the Army to be *no longer needed* for those purposes. *Id.* 1340.

The Federal Circuit found that the Pueblo's ownership of the mineral rights was *not* "carved out" of the Pueblo's ownership rights to the land and given to the Army:

> If Congress had intended to effect such a statutory inconsistency — by expressly conveying all mineral rights to the Pueblo and then excluding mineral rights to the PLO 873 land — it would have included far more than the notation that some of the land was "*subject to*" PLO 873, the terms of which do *not convey mineral rights to the United States.*

*Id.* at 1341[33] (emphasis added). Under such circumstances, the

31. Br. 24.

32. Opp. Br. 28, n.35.

33. Citing *I.N.S. v. Cardoza-Fonseca*, 480 U.S. at 432, 107 S. Ct. 1207 (1987) ("'Where Congress includes particular language in one

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court concluded that it could not find clear congressional intent to keep ownership of the mineral rights in the United States,[34] but found that the United States retained a "right" in the nature of an "easement of access for the purposes of operating and maintaining the [Jemez Dam]." *Id.* at 1342. Thus, the Army Corps of Engineers had the right to use minerals from the Pueblo's land, but had to pay for them. The court also noted than any lingering doubts as to statutory construction of the 1978 Act must be resolved to the benefit of the Pueblo, citing in support *DeCoteau v. District County Court*, 420 U.S. 425, 444, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975) (ambiguous or uncertain statutory provisions in laws intended to benefit Native Americans construed in their favor). *Id.* 1342.

Another basic rule of statutory construction is to avoid construing statutes in a manner which would lead to unjust or absurd consequences. *Church of Scientology v. United States Department of Justice*, 612 F.2d 417, 427 (8th Cir. 1979). This Court has applied legislative history to avoid a literal meaning which would have resulted in "patently absurd consequences" that "Congress could not possibly have intended." *Public Citizen v. Department of Justice*, 491 U.S. 440 at 455-465 (1989). If the Government's flawed interpretation of the 1960 Act is adopted by the Court, it would lead to a patently absurd and unjust consequence. The 1960 Act which plainly conveyed "all right, title and interest of the United States" in the property in trust for the Tribe cannot simultaneously grant the Secretary

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section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (Quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983)).

34. Citing *Ratzlaf v. United States*, 510 U.S. 135, 143, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994) (courts avoid reading portions of statutes inconsistently); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S. Ct. 3245, 73 L. Ed. 2d 973 (1982) (same); *Vectra Fitness, Inc. v. TNWK Corp.*, 162 F.3d 1379, 1384-85 (Fed. Cir. 1998) (same).



of the Interior an "open-ended" right to destroy the same property by dynamite or neglect as claimed by the Government.[35]

In defiance of the clear text of the 1960 Act and its legislative history,[36] the Government refuses to let go of its fixed idea that

35. During oral argument below in the Court of Appeals, December 7, 2000, the court inquired what the Government's position would be if "the United States tomorrow dynamited to the ground all 36 buildings," to which the Government replied,

> I do believe that the United States has no special obligation to the Tribe with regard to any building needed for the operation of the school and therefore subject to the reservation in the 1960 statute. So, therefore, if it were deemed appropriate to dynamite those buildings to the ground by the Secretary of Interior, it would be within the Secretary's discretion to do so.

In response to the court's inquiry whether the Tribe had any property right that was impaired by that destruction, the Government replied: "I don't believe so, Your Honor. I believe that beneficial title has not even passed as to any of those portions of the site that are retained for exclusive use by the United States." (Tr., December 7, 2000, p. 23), Opp. Br. 28, n.35.

36. Senate Report No. 671, [S.2268], 86th Cong., 1st Session (1959), R.L.11; "[T]he *purpose* of S.2268 is to provide that the United States holds in trust approximately 7,579 acres of land, together with improvements thereon, *for* the White Mountain Apache Tribe of Arizona. The lands to be *restored* to the Tribe. . . ." *Id.*, R. L. 8. (Emphasis added.)

Report No. 1284 (February 22, 1960) accompanying H.R. 8796, the companion Bill to S.2268, states in applicable part "[T]he bill explicitly provides *that the Tribe's beneficial ownership of the property*. . . ." (Emphasis added.) R. L. 25.

See generally, Transcript of Hearings, H.R. 8796 [S.2268] House Subcommittee on Indian Affairs — Committee on Interior and Insular Affairs, February 11, 1960 (title to the school buildings would *not* remain in the Secretary of Interior, but would be maintained in full trust status with beneficial ownership in the Tribe). R. L.12-24.

The Tribal Council was equally clear on the status of the lands to be restored to the Tribe. The Department of the Interior, Bureau of Indian

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the 1960 Act was actually a "land grant" for its benefit and not the Tribe, citing in support, *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983). Br. at 29. *Western Nuclear* is not applicable as it basically involved a dispute over the definition of "minerals" in a land grant. There is no definitional ambiguity in the 1960 Act and no "land grant" to the Government, only a defeasible use right or easement in favor of the Secretary of Interior. There is no conflict of canons in this case either, but even if there was a conflict between the Indian canon and the presumption of a liberal interpretation of a land grant to the Government, the Indian canon must predominate. *Choate v. Trapp*, 224 U.S. 665 at 674-675 (1912). This Court has also held that the general presumption supporting the legality of Executive action must yield to the Indian canon, a counter-presumption specific to Indians. *Minnesota v. Millelacs Band of Chippewa Indians*, 526 U.S. 172, 194, n.5 (1999).

**C. The Government has a fiduciary obligation to protect the Tribe's trust property during its authorized control and use**

The 1960 Act expressly conveyed property in trust for the Tribe and was enacted against the backdrop of a general trust relationship between the United States and the Indian tribes that had long been considered to "resembl[e] that of a ward to his guardian." *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831).[37]

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Affairs, inquired if the Tribe "would be willing to have the subject lands in a taxable status." R. L. 4. In reply,

> [T]he Tribe felt that inasmuch as the land was withdrawn from the reservation by Executive Order without compensation to the White Mountain Apache Tribe . . . that the land should be returned to the United States in trust for the White Mountain Apache Tribe in the same status as the entire balance of the reservation.

Tribal Council Legislative Minutes, Sept. 24, 1958. R. L. 5-7,

37. *See also Morton v. Mancari*, 417 U.S. 535, 541-42 (1974); *United States v. Mason*, 412 U.S. 391, 398 (1973); *Squire v. Capoeman*, 351 U.S. 1, 2 (1956); *United States v. Payne*, 264 U.S. 446, 448 (1924); *United States v. Kagama*, 118 U.S. 375, 382 (1886).



It does not make sense to assume that when Congress in the 1960 Act established an express "trust" for the Tribe it intended to depart from these well-known fiduciary principles. Thus, when the Federal Government chose to undertake comprehensive and exclusive control over the Tribe's property after Congress declared the property in trust, it moved into a full fiduciary relationship with respect to the Tribe's trust property within the holding of *United States v. Mitchell* (II), 463 U.S. 206, 225, 103 S. Ct. 2961, 2972 (1983).[38]

Although Congress can unilaterally act in a fashion adverse to Indian interests, such an intent must be "clear," "plain," or "manifest" in the language or legislative history of an enactment. The 1960 Act discloses no Congressional intent to grant the Secretary of Interior *a right* to depreciate the value of the Tribe's trust property that Congress conveyed to the Tribe. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *United States v. Creek Nation*, 295 U.S. 103 (1935) (Held: Unless Congress has expressly directed otherwise, the Federal Executive is held to a strict standard of compliance for fiduciary duties.); F. Cohen, *Handbook of Federal Indian Law* (1982 ed.), 225-228. There is also no manifestation of Congressional intent in the 1960 Act *to relieve* the United States of its fiduciary obligation to protect and maintain the Tribe's trust property during the Government's exclusive use and control. Silence as to that obligation cannot overcome the "presumption that absent explicit language to the contrary, all funds and property held by the United States for Indian Tribes are held in trust."[39]

38. *See also White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 620, 649-650 (1987); *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183; 624 F.2d 98, 987 (Ct. Cl. 1980) and *Brown v. United States*, 86 F.3d 1554, 1561 (Fed. Cir. 1996). *See also Restatement (Second) of Trusts* (1959) § 2 and 1 Scott § 2.5 (1. A. Scott, *The Law of Trusts* (3d ed. 1967).

39. *Rogers v. United States*, 697 F.2d 886, 890 (9th Cir. 1983); *United States v. Mitchell*, 463 U.S. 206, 225, 103 S. Ct. 2961, 2972 (1983); *Seminole Nation v. United States*, 316 U.S. 286, 296-97,
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### 1. *Detailed management duties not required if control present*

In *Mitchell II*, this Court's acknowledgment of a general trust responsibility and of rules of construction applicable to Indian law indicates that detailed delineation of management duties is not required.[40] The Court recognized elaborate control by the Government over Indian property as an independent basis for its finding of a fiduciary duty in *Mitchell II*, at 224, 103 S. Ct. at 2972. *See also Brown v. United States*, 86 F.3d 1554, 1561 (Fed. Cir. 1996); *Duncan v. United States*, 667 F.2d 36, 42-43 (Ct. Cl. 1980) *cert. den.*, 103 S. Ct. 3569 (1983) (Federal trust need not spell out all duties of the Government due to the history of the Governmental fiduciary obligation in management of Indian property — broad scale Congressional establishment

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62 S. Ct. 1049, 1054-55 (1942) (footnote omitted). *Loudner v. United States*, 108 F.3d 896, 900 (8th Cir. 1997); *Moose v. United States*, 674 F.2d 1277 at 1281 (9th Cir. 1982), citing *Navajo Tribe v. United States*, 224 Ct. Cl. 171, 624 F.2d 981, 987 (Ct. Cl. 1980) n.10. *See also Short v. United States*, 719 F.2d 1133, 1137 (Fed. Cir. 1983) (finding accounts containing proceeds of individual Indian labor, and interest thereon, to be designated as trust funds), *cert. denied*, 467 U.S. 1256 (1984); *Rogers v. United States*, 877 F.2d 1550, 1553 (Fed. Cir. 1989) (interpreting *damages award* for taking of aboriginal homelands *as trust funds* subject to statutory duty to invest), *Brown v. United States*, 86 F.3d 1554, 1559-1561 (Fed. Cir. 1996).

40. In the context of Congressional Acts in Indian affairs, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985). *See also Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956); *Fox v. Morton*, 505 F.2d 254, 255 (9th Cir. 1974); *Choate v. Trapp*, 224 U.S. 665, 675, 32 S. Ct. 565, 56 L. Ed. 941 (1912) (holding that while tax exemptions are generally construed narrowly, in "the Government's dealings with the Indians the rule is exactly contrary, the construction, instead of being strict, is liberal."); *DeCoteau v. District County Court*, 420 U.S. 425, 444, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975) (ambiguous or uncertain statutory provisions in laws intended to benefit Native Americans construed in their favor).



of trust is enough). The *Duncan* court further observed, "[i]t is difficult to see why Congress should have to do more to create an Indian trust than a private settlor would have to do to establish a private trust." *Duncan*, at 43 n.10.[41]

The reasoning of the Court in *Mitchell II*, and by the court of appeals below, recognizing elaborate control by the Government over Indian property as an independent basis for finding of a fiduciary duty, makes complete sense as most statutory schemes in Indian affairs are not as detailed as the timber management statutes and regulations in *Mitchell II*, and most statutes that regulate Indian affairs do not delineate specific management duties or provide for money damages for mismanagement. Other federal court decisions have recognized a breach of fiduciary duty based on the Government's action once it has undertaken action, even though no statutory or regulatory scheme required the Government to generate income for the Tribe from the particular Tribal resource or property at issue.[42]

41. *See also* Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, American University Law Review 41:753 (1991/92) at 804:

> [*A*]*ssuming a statutory basis at least permitting the action*, actual control may be a sufficient factor on which to base a claim for breach of fiduciary duty by mismanagement of the trust. . . . *As long as the Government, and not the Indian or the tribe, has actual control* over the management of a resource, the exercise of this control can create a trust claim.

(Emphasis added.)

42. *See White Mountain Apache Tribe of Arizona v. United States*, 11 Cl. Ct. 614, 620 (1987) citing *Navajo Tribe of Indians v. United States*, *id.*; *Gila River Pima Maricopa Indian Community v. United States*, 231 Cl. Ct. 193, 208, 684 F.2d 852, 861 (1982) (per curiam) (held: although the Government had no statutory or regulatory duty to develop irrigation facilities on the Reservation, failure to protect water resources can be actionable). *See also Fort Mohave Indian Tribe v. United States*, 23 Cl.Ct. 417, 426 (1991) ("[T]he trustee has a duty to protect the trust property [reserved water rights] against damage or destruction and is

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The Government tries to avoid this reality by arguing that this Court's *description* of the clarity with which the Government's duties were established in *Mitchell II* is the *prescription* for determining whether a fiduciary duty exists in other domains; even in this case, where there is no need to resort to an extended disquisition of statutes and regulations to find the requisite governmental control that would give rise to a full fiduciary relationship and enforceable trust duty. This view was rejected by the Federal Circuit Court of Appeals in *Brown v. United States*, which held that the "transformation of the descriptive into the prescriptive is improper." 86 F.3d 1554, 1559, n.6 (1996). Emphasizing this Court's disjunctive "control or supervision" test (*Mitchell II*, *id.* at 225, 103 S. Ct. at 2972), the court found that "nearly complete government management (i.e., 'supervision') or control, while more than sufficient to create an enforceable fiduciary duty, is not necessary." *Brown*, at 1560, and *Id.*, n.7.[43]

**2. *The Tribe has a Congressionally recognized and protected property right***

In the absence of the 1960 Act's "subject to" authorization, the Secretary could not physically occupy and control the Tribe's

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obligated to the beneficiary to do all acts necessary for the preservation of the trust *res*. . . ."). *See also Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113, 39 S. Ct. 185, 63 L. Ed. 504 (1919) (Holding that United States has fiduciary obligation to not alienate trust lands currently occupied by Indians even where the Government had neither control nor supervision of the trust property), cited by the Court of Appeals below, Pet. App. 17a, n.11.

43. Citing *Navajo Tribe of Indians v. United States* decided soon after *Mitchell I*, where the Court of Claims rejected the government's contention that "no fiduciary obligation can arise unless there is an *express* provision of a treaty, agreement, executive order or statute creating such a trust relationship." 224 Ct.Cl. 171, 624 F.2d 981, 987 (1980) (emphasis in original).



trust property, except by leasing it from the Tribe,[44] or unless Congress, in the exercise of its plenary power over Indian affairs and property, took the property from the Tribe under the "Takings Clause" of the Constitution. Thus, once a Tribe has a vested property right (equitable title) recognized by treaty or Act of Congress, including vested property rights created by Executive Order, abrogation of those property rights are not lightly inferred from Congress' Acts and any such abrogation is subject to Constitutional limitation. *See United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 115, 58 S. Ct. 794, 82 L. Ed. 1213 (1938) ("Held: United States does not have the power *to appropriate to its own use any part of the* [Tribe's] *land* without rendering, or assuming obligation to pay just compensation to the Tribe, for that would be, not the exercise of guardianship or management, but an act of confiscation."). *See also Chippewa Indians of Minnesota v. United States*, 301 U.S. 358, 375, 57 S. Ct. 826, 81 L. Ed. 1156 (1937) (Government power to control and manage the property and affairs of Indians is subject to

44. The Government has leased some of the property to third parties in accordance with 25 C.F.R. § 162, *et seq.*, which regulates leases and permits of Indian land. *See, e.g.*, Fort Apache Post Office lease, Joint Appendix JA75-80, Tribe's Br. CAFC. The Secretary of Interior is responsible for administering and enforcing this lease "through appropriate inspections and enforcement actions as needed *to protect the interests of the Indian landowners*," including the taking of "other emergency action as needed to *preserve the value of the land.*" 25 C.F.R. 162.108(b) (emphasis added).

The Government could also be held liable by invitees to the Fort Apache site under the Federal Tort Claims Act for injuries proximately caused by its failure to maintain the Tribe's trust property under its control. *See, e.g., O'Toole v. United States*, No. 01-15310 (9th Cir. 2002) (Held: BIA liable for negligent maintenance of irrigation system on Indian Tribe's ranch which flooded neighboring non-Indian ranch) citing in support, *Berkovitz v. United States*, 486 U.S. 531, 537 (1981) and *Indian Towing Company v. United States*, 350 U.S. 61 (1955).

constitutional limitations and "does not enable the Government . . . . *to deal with them as its own.*") (emphasis added).[45]

3. ***No conflict in canons***

The Government cites *Chickasaw Nation v. United States*, 122 S. Ct. 528, 535-536 (2001), in support of its argument that the Indian canons cannot overcome the 1960 Act's silence as to the Government's fiduciary obligation to protect the Tribe's trust property while under its control and use. Br. at 28-29. *Chickasaw* does not apply as this is not a tax exemption case, nor is there a conflict in the 1960 Act. The Government's reserved right to use the Tribe's trust property for administrative or school purposes is not challenged by the Tribe and can easily coexist with the Government's fiduciary obligation to maintain the property. Unlike the canons found inapplicable or in conflict in *Chickasaw*, there is no offsetting or conflicting canon in this case that would overcome the Indian canon that assumes Congress intends enactments affecting Indians to be for their benefit.[46]

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45. *United States v. Creek Nation*, 295 U.S. 103, 110, 55 S. Ct. 681, 79 L. Ed. 1331 (1935) (no taking without just compensation); *Spalding v. Chandler*, 160 U.S. 394, 404, 16 S. Ct. 360, 40 L. Ed. 469 (1986); *Gibson v. Anderson*, 131 F. 39, 41-42 (9th Cir. 1904).

46. *See County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247 (1985). *See also Chickasaw Nation v. United States*, 122 S. Ct. 528 at 538 (2001) (dissent of Justice O'Connor)

> The Indian canon presumes Congressional intent to assist its wards to overcome the disadvantages our country has placed upon them, . . . .
>
> Consistent with this purpose, the Indian canon applies to statutes as well as treaties: the form of the enactment does not change the *presumption* that Congress generally intends to benefit the Nations, *Montana et al. v. Blackfeet Tribe of Indians*, 471 U.S. 759 at 766 (1985); *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992).



4. ***The 1960 Act's silence as to money damages does not bar the Tribe's claim.***

This Court in *Mitchell II* found that it was not significant that the statutes and regulations in that case did not explicitly state that the United States could be held financially responsible for damages to the Indians resulting from the United States' management decisions. It was enough that the statutes and regulations in that case created a fiduciary responsibility. *Mitchell II* at 226, 103 S. Ct. at 2972. The Court looked beyond the particular source of law, which was silent regarding damages and found an *implicit* or inherent requirement of compensation for breach of fiduciary duty by looking to the common law of trusts. *Mitchell II* at 226, 103 S. Ct. at 2973.[47] *See Brown v. United States*, 86 F.3d 1554, 1559 n.6 (Fed. Cir. 1996).

The court of appeals below looked to the applicable source of the substantive law which may grant the right to recovery either "*expressly or by implication*," *Eastport S.S. Corp. v. United States*, 178 Ct.Cl. 599, 372 F.2d 1002, 1007 (1967), and concluded that the Government's control and use of the Tribe's property pursuant to the 1960 Act was a source of substantive law that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained," citing *Mitchell II*, 463 U.S. at 217, 103 S. Ct. 2961, quoting *United States v. Testan*, 424 U.S. 392, at 400, 96 S. Ct. at 954 [quoting *Eastport S.S. Corp. v. United States*, 178 Ct.Cl. 599, 372 F.2d 1002, 1007 (1967)]. Pet. App. 8a, 15a-18a. *See Brown v. United States*, *supra*, 86 F.3d 1554, discussing "the Mitchell Decisions" at 1559.

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47. *See also e.g.*, *American Indians Residing on the Maricopa Ak-Chin Reservation v. United States*, 667 F.2d 980, 990 (Ct. Cl. 1981) (trustee liability for breach of fiduciary duty *inherent* in trust relationship; damages are appropriate remedy for breach), *cert. denied*, 456 U.S. 989 (1982); *Whiskers v. United States*, 600 F.2d 1331, 1335 (Ct. Cl. 1979), *cert. denied*, 444 U.S. 1078 (1980); *Coast Indian Community v. United States*, 550 F.2d 639, 653 (Ct. Cl. 1979); *Cheyenne-Arapaho Tribes of Indians v. United States*, 512 F.2d 1390, 1392-94 (Ct. Cl. 1975).

If this Court is to give the words of the 1960 Act their ordinary meaning ["trust"], as it has in cases when the law does not define a statutory phrase precisely, *Group Life and Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, at 211 (1979), the Court should find that the 1960 Act imposes fiduciary obligations on the United States as a trustee under the statutory and factual circumstances before it. By expressly conveying and declaring the property in "trust" for the Tribe, it may necessarily be inferred Congress knew the significance of the term "trust" as well as the other property conveyance terms used in the 1960 Act. Thus, "where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary." *Lorillard v. Pons*, 434 U.S. 576, at 583 (1977) quoting *Standard Oil v. United States*, 221 U.S. 1, 59 (1911). *See also Gilbert v. United States*, 370 U.S. 650, 655 (1962) and *Montclair v. Ratisdell*, 107 U.S. 147, 152 (1883). It is not clear whether Congress envisioned that Federal officials would fail to protect and maintain the property it conveyed in trust to the Tribe. It is enough that Congress intended that the language it enacted would be applied as the court of appeals applied it, including a trust remedy to protect Congress' purposive intent in the 1960 Act. This Court did similarly in *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982), when it turned to legislative history to show that Congress, even though it may not have had a particular result in mind, intended for the statute to be applied as the Court applied it.

The customary practice of this Court and other lesser federal courts to look to the common law of trusts, as modified by the statutory or other source of the substantive right giving rise to a Tribe's breach of trust claim, has its analogue in the area of implied and express contracts between the United States and private parties, an area viewed as perhaps "[t]he widest and most unequivocal waiver of federal immunity from suit." *Mitchell II* at 215, citing *Developments in the Law – Remedies Against the United States and Its Officials*, 70 Harv. L. Rev.



827, 876 (1957) and 14 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3656, p. 202 (1976). The Tucker Act, 28 U.S.C. § 1491, is the source of the United States' consent to be sued for breach of contract.[48] The Government apparently has no qualms about courts looking to the *Restatement of Contracts* for principles of contract law applicable to cases before them,[49] but flinches when the court of appeals below looked to the *Restatement (Second) of Trusts* to assist in its determination of the nature of the Government's fiduciary obligations as an *in situs* trustee in total control of its beneficiary's trust property. Br. 17. The Tucker Acts, however, make no distinction between claims founded upon contracts, and claims founded upon other specified sources of law. *Mitchell II* at 215.

It follows that the necessary corollary to application of private contract law when the Government enters into contracts is to apply the law of trusts when the United States functions as an *in situs* Trustee. Congress' purposive intent in the 1960 Act was to convey equitable title to valuable property "in trust" for the Tribe. This intent necessarily includes or implies a remedy under applicable concepts of trust law to protect the trust

48. When the United States breaches a contract it has entered — whether that contract is expressed or implied in fact — it is liable in money damages under the Tucker Act. *See United States v. Milliken Imprinting Co.*, 202 U.S. 168 (1906). The contract need not state that the United States intends to be held liable in money damages for any breach. All that is required is a breach of the contract, as consent to suit is provided in "the waiver of sovereign immunity in the Tucker Act." *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 466 (1980).

49. "[W]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals," and "[t]he Restatement of Contracts reflects many of the principles of contract law that are applicable to this action." *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607-608 (2000). *See also Franconia Associates v. United States*, 536 U.S. __, 122 S. Ct. 1993 (2002) and *Clearfield Trust Company v. United States*, 318 U.S. 363, 369 (1943), "[t]he United States does business on business terms."

property from damage resulting from breach of trust while under the trustee Government's exclusive physical control and use. As there is no need for a Federal Government contract to spell out expressly that the Government may be sued in damages for breach of contract, *a fortiori*, it is not necessary that an express trust established by Congress for an Indian Tribe specifically state that the Government may be sued for damages for failure to protect that property while under its exclusive physical control, use and management. Thus, "[g]iven the existence of a [full] trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties," as "[i]t is well established that a trustee is accountable in damages for breaches of trust," *Mitchell II*, 463 U.S. at 226, 103 S. Ct. 2961. See discussion (same) by court of appeals below. Pet. App. 26a.

**5. *The 1960 Act does not create a right in the Government to destroy the Tribe's trust property*.**

While the Secretary unquestionably has a reserved right in the 1960 Act to use the Tribe's trust property for administrative or school purposes, that right is not unlimited. *See Navajo Tribe v. United States*, 364 F.2d 320, 324 (1966). *See also Cheyenne-Arapaho Tribe of Oklahoma v. United States*, 966 F.2d 583, 588 (10th Cir. 1992) (Although *control* was relegated to the Secretary by statute over gas and oil leases on Indian lands, the United States' function as a trustee over Indian lands *necessarily limited the Secretary's discretion* when approving the agreements).

The Government's novel view of its fiduciary obligation to the Tribe in this case, that it can treat the Tribe's trust property as if it were its own and even destroy it, defies a long line of decisions by this Court. *Cramer v. United States*, 261 U.S. 291 (1923) (Held: trust responsibility and national policy protecting Indian land occupancy *limited* the general statutory authority of federal officials). In accord, *United States v. Creek Nation*, 295 U.S. 103 (1935) ("power to control and manage was not



absolute . . . . it was subject to *limitations inherent in such a guardianship* and to pertinent Constitutional restrictions."). *Id.* at 109-10 (emphasis added).

The principle that the trust responsibility applies to the Executive Branch is applicable to this case, where the Secretary of Interior, as the Tribe's guardian and trustee, controls and uses the Tribe's trust property.[50] The Secretary's reserved right to use the Tribe's property cannot trump Congress' plenary authority over Indian property manifested in the 1960 Act by its purposive intent to convey a protected and compensable property right in trust for the Tribe. It is also of no moment that courts have found a fiduciary obligation in cases involving special jurisdictional acts as the Government has previously inferred. Pet. Reply Br. 9. *Cf. Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (1980).[51] The fiduciary obligation of the United States to protect and not cause or allow waste, destruction, or loss of value to Indian trust monies or property under its supervision, management or control is a well-established principle in Federal Indian law and policy and may be the basis for a money-mandating claim as expressed by this

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50. The relationship between the United States and an Indian Tribe has often been characterized as one of a guardian and ward. A guardian of the property of a person who is under an incapacity is a Trustee in the broad sense of that term. *Scott on Trusts, supra.*, § 7 at p. 85. A guardian usually does not take title to the property, but like a trustee, a guardian is a fiduciary. *Id.* p. 85, n.1, citing *Smith v. Smith*, 210 F. 947 (D. MT. 1914), *affirmed*, 224 F. 1 (9th Cir. 1915).

51. "In *Menominee Tribe, supra*, we held explicitly that a special jurisdictional statute making ordinary fiduciary standards applicable to the United States, 'add[s] little to the settled doctrine that the United States, *as regards its dealings with the property of the Indians*, is a trustee.' (Emphasis added). 101 Ct.Cl. at 19." "Likewise, *Navajo Tribe, supra*, 176 Ct.Cl. at 507, 364 F.2d at 322, observed that '[n]umerous cases have expressed the notion that, *when dealing with Indian property*, the Government may be acting as a 'trustee.' (Emphasis added)." *Id.* 987.

Court in *Mitchell II*, 463 U.S. 206, 225, 103 S. Ct. 2972, and in other federal court decisions.[52]

Federal courts have also consistently emphasized that Federal agencies must deal with Tribes according to the "most exacting fiduciary standards"[53] and have observed that the Bureau of Indian Affairs (BIA), in particular, has a special trust responsibility beyond those of other Federal agencies, because it is responsible for managing Tribal lands and resources as the

52. *See, e.g., Pyramid Lake Paiute Tribe of Indians v. United States Dep't. of the Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990) (finding trust duty to protect fishery in reservation lake); *Fort Mojave Indian Tribe v. United States*, 23 Cl.Ct. 417, 425-26 (1991) (finding trust duty to protect reservation water rights); *White Mountain Apache Tribe v. United States*, 11 Cl.Ct. 614, 672 (1987) (finding trust duty to protect Indian forest lands), *aff'd.*, 5 F.3d 1506 (Fed. Cir.), *cert. denied*, 114 S. Ct. 1538 (1993); *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 750 (10th Cir. 1987) (finding trust responsibility to protect wildlife resources); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C.) (1973) (finding trust duty to protect water resources), modified on other grounds, 360 F. Supp. 669 (D.D.C. 1973), *rev'd in part on other grounds*, 499 F.2d 1095 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *Mitchell v. United States*, 10 Cl.Ct. 787, 788 (1980) (Held: Bureau of Indian Affairs has continuing trust duty to replant harvested areas.)

*See* American Indian and the Federal–Indian Relationship; Including Treaty Review 179 (Comm. Print 1976) [hereinafter Trust Report] (applying trust principles to Government's role in protecting Indian land); *White Mountain Apache Tribe v. United States*, 11 Cl.Ct. 614, 681, *aff'd*, 5 F.3d 1506 (Fed. Cir. 1987), *cert. denied*, 114 S. Ct. 1538 (1993) (government breached fiduciary duty by overcutting tribal forest lands and overgrazing tribal grazing lands).

53. *Seminole Nation v. United States*, 316 U.S. 286 at 297 (1942); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 at 256 (D.D.C. 1973). Decisions of the Court of Claims have uniformly held that the standards of a private fiduciary must be adhered to by Executive officials administering Indian property. *See, e.g., Coast Indian Community v. United States*, 213 Ct Cl. 129, 550 F.2d 639 (1977); *Cheyenne-Arapaho Tribes v. United States*, 206 Ct.Cl. 10, 18-19 (1944); *Navajo Tribe v. United States*, 364 F.2d 320, 322-324 (Ct.Cl. 1966).



principal agent of the Trustee, United States.[54] In *Nevada v. United States*, 463 U.S. 110 (1983) at 127, this Court observed that it "has long recognized 'the distinctive obligation of trust incumbent upon the Government' in its dealings with Indian Tribes," citing *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942), and that these concerns have been traditionally focused on the Bureau of Indian Affairs within the Department of the Interior." Citing *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 374 (1968).

It is clear that the court of claims has jurisdiction to award damages for waste. An implied covenant against waste has been found to exist by the Claims Court in a lease between a private corporation and the United States, *even* in the absence of a trust relationship. In *Italian National Rifle Shooting Society of the United States v. United States*, 66 Ct. Cl. 418 (1928), citing *United States v. Bostwick*, 94 U.S. 53, 68, 69 (1876), the court of claims held that even though there was *no express* agreement to leave the premises in as good condition as when received (ordinary wear and tear accepted), and there was *no express* agreement in the lease not to commit waste, the United States was nevertheless liable for any loss resulting from want of reasonable care and use of the property and was bound not to commit waste or suffer it to be committed. These cases and

54. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) at 217 (the Department of Interior "has the primary responsibility for carrying out the Federal Government's trust obligations to Indian Tribes."); *Pyramid Lake Paiute Tribe of Indians v. United States Dep't. of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990); *Navajo Tribe v. United States*, 364 F.2d 320, Ct.Cl. (1966). *See generally United States v. Winnebago Tribe*, 542 F.2d 1002 (8th Cir. 1976); *Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (Ruiz may impose more extensive procedural requirements on the Bureau of Indian Affairs than are customary for federal agencies. *See* Davis, *Administrative Law Surprises in the Ruiz Case*, 75 COLUM.L.REV. 823 (1975) cited with approval in *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) at 1100. *See also* F. Cohen, *Handbook of Federal Indian Law*, pp. 225-228 (1982 ed.).

others cited, *supra*, leave little room for the Government's argument that it has no fiduciary obligation to protect the Tribe's trust property during its exclusive control and use from waste and depreciation or that the court of claims cannot award money damages for waste, to use a property law analogy.

### 6. *The decision of the Court of Appeals does not depart from this Court's decisions in Mitchell I and Mitchell II*

The court of appeals' decision below is consistent with this Court's decisions in *Mitchell I* and *Mitchell II*. The court agreed that if the Government had never exercised exclusive control and use of the Tribe's trust property for administrative or school purposes, only a 'bare trust' relationship (*Mitchell I*) would have been created by the 1960 Act and the United States would have had no fiduciary obligation to protect, maintain or manage the Tribe's trust property. However, the court found that the Government's decision to use and control the Tribe's valuable trust property categorically took the Tribe's claim outside the "bare trust" circumstances of *Mitchell I* and moved it into a full fiduciary relationship within the Court's decision in *Mitchell II*. While it was Congress' intent in the General Allotment Act that the Government not *control use of the allottees' land*, *United States v. Mitchell*, 535, at 544, 100 S. Ct. at 1354 (1980), the opposite applies here where the 1960 Act clearly authorizes the Government to control and use the Tribe's property.

In *Mitchell II*, this Court analyzed the timber statutes and regulations involved in that case to find the requisite Governmental *control* which would give rise to a full fiduciary relationship and enforceable obligation in the United States to manage the allottees' timber resources. No such analysis by the Court is necessary in this case to find the requisite Governmental control which would give rise to an enforceable fiduciary obligation. This Court's decision in *United States v. Testan*, 424 U.S. 392 (1976), upon which the Government frequently draws comparisons to the 1960 Act, also supports the Tribe's claim.



In *Testan*, this Court reviewed the Classification Act, 5 U.S.C. § 5101 *et seq.* and the Back Pay Act, 5 U.S.C. § 5596, to determine whether those statutes conferred a substantive right to recover money damages from the United States for back pay from a job the plaintiffs *never* occupied. The Back Pay Act's coverage provided monetary payments, but only to those who were wrongfully reduced in grade, suspended or terminated. It did not apply to persons who alleged they were entitled to the benefits of a higher grade. *Id.* at 405-406. The Classification Act provided administrative procedures for reclassification, but lacked a provision for back pay.[55] Thus, neither Act conferred upon the claimants a substantive right to the payment of money.

The Tribe's claim here has no such obstacle. The 1960 Act provides the statutory basis for the Tribe's substantive right to the payment of money damages. The Tribe's claim is also analogous to the Back Pay Act's coverage in *Testan* which provides monetary payments for those who are wrongfully reduced in grade, suspended or terminated. The Tribe's valuable vested property right has been wrongfully depreciated and reduced in value as a direct result of its trustee's breach of fiduciary duty. *Testan* also tells us that, "[T]he asserted entitlement to money damages depends upon whether any Federal statute" can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained," citing *Eastport S.S. Corp. v. United States*, 178 Ct.Cl. at 607, 372 F.2d 1002 at 1009, and that the substantive statute upon which a Tucker Act claim is based need not *expressly* state that the United States can be held accountable in money damages, *Eastport S.S. Corp. v. United States*, 178 Ct.Cl. at 605, only that the statute must "grant the claimant, expressly or by implication" a right to

55. Both statutes were construed in light of the "established rule" that "the Federal employee is entitled to receive only the salary of the position to which he was appointed." A rule which the court held was not changed or overruled by Congress in the Classification or Back Pay Acts. *Id.* at 402, 406.

money damages. Certainly, the 1960 Act which expressly conveyed valuable land and improvements in "trust" to the Tribe, includes by implication, a remedy for breach of trust.

The Government apparently perceives it will find a safe harbor from liability for Indian claims based on breach of trust if it can persuade the Court to hold that Tribal claims under the Indian Tucker Act cannot be based on breach of trust. It argues that the Court should instead apply its criteria for determining private rights of action which has no Tucker Act counterpart and which resides in an arena far removed from the *sui generis* jurisprudence of Federal Indian law. In pursuit of this goal, the Government tries to inveigle this Court's attention by invoking the specter of "separation of powers concerns" which in its view is engendered by "unanchored, judge-made principles of common law" by the court of appeals below. Br. 13, 34, 42-43. The only separation of powers concerns that arise in this case stem from the Government's refusal to recognize that Congress did not grant the Secretary of Interior an unlimited right in the 1960 Act to destroy property which Congress, in the exercise of its plenary power over Indian affairs and property, specifically conveyed in trust for the benefit of the Tribe. The Government's insistence of the Secretary's unbridled right to do with the Tribe's property as it pleases, impermissibly invades the province of Congress over Indian affairs and property and defeats Congress' purposive intent in the 1960 Act. The Tribe, as an injured beneficiary of an express Congressional trust, has a right of action against its trustee when that trustee, without any semblance of authority from Congress, destroys by neglect or design, the value of its trust property.



## CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 21

No. 01-1067

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

WHITE MOUNTAIN APACHE TRIBE

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FEDERAL CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

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No. 01-1067

UNITED STATES OF AMERICA, PETITIONER

*v.*

WHITE MOUNTAIN APACHE TRIBE

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

The Tribe acknowledges that the 1960 Act expressly reserved to the government the "right" to use Fort Apache for its own purposes "for as long as" it deems such use necessary, and that the 1960 Act contains no provision imposing a duty on the Secretary of the Interior to manage the property for the benefit of the Tribe while it is being used for government purposes. See Resp. Br. 11, 34, 38; Pet. App. 14a-15a. The Tribe nonetheless argues that the Act both imposes such a duty and confers on the Tribe a substantive right to recover money damages against the government for alleged mismanagement of the property while the government is still exercising its reserved right. As explained below, that argument is contradicted by the terms of the 1960 Act, this Court's Tucker Act

decisions, and bedrock sovereign immunity principles. It should be rejected by this Court.

### A. A Substantive Right To Recover Money Damages Under The Tucker Act Must Be Specifically Conferred By Congress

The Tribe acknowledges (at 12) that the 1960 Act is "silen[t] about money damages," but argues that it is entitled to damages based on considerations drawn from secondary considerations that it seeks to read into the Act. That mode of analysis is out of step with this Court's precedents. This Court has firmly rejected the notion that the Tucker Act "waives sovereign immunity with respect to any claim invoking a constitutional provision or a federal statute or regulation." *United States* v. *Testan*, 424 U.S. 392, 400 (1976) (emphasis added). Rather, under the Tucker Act and this Court's decisions, the United States is immune from a suit for money damages based on any claim founded on an Act of Congress, unless the Act "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States* v. *Mitchell*, 463 U.S. 206, 218 (1983) (*Mitchell II*); see U.S. Br. 14-20.

Moreover, the "grant of a right of action [for money damages] must be made with *specificity*." *Testan*, 424 U.S. at 400 (emphasis added); accord *Army & Air Force Exch. Serv.* v. *Sheehan*, 456 U.S. 728, 739-740 (1982) (Under the Tucker Act, "jurisdiction over respondent's complaint cannot be premised on the asserted violation of regulations that do not *specifically* authorize awards of money damages.") (emphasis added). In that regard, the analysis applied in determining whether an Act of Congress creates a substantive right to damages that is enforceable under the Tucker Act squares with the analysis that the Court applies in determining whether



an Act of Congress creates a federal right that is privately enforceable under the general terms of 42 U.S.C. 1983. See U.S. Br. 17, 42-43; *Gonzaga Univ.* v. *Doe*, 122 S. Ct. 2268, 2275 (2002) (federal statute must contain "unambiguously conferred right" for suit to lie under Section 1983); *id.* at 2273 (federal statute must "confer[] entitlements sufficiently specific and definite to qualify as enforceable rights") (internal quotations omitted); *id.* at 2274 ("specific, individually enforceable rights").

### B. The 1960 Act Does Not Create A Substantive Right To The Payment Of Compensation

1. The Tribe claims (at 43) that "[t]he 1960 Act provides the statutory basis for the Tribe's substantive right to the payment of money damages" in this case. But nothing in the 1960 Act confers any specific monetary entitlements, speaks in terms of money damages or claims, or indeed has any monetary character at all. See U.S. Br. 21-22. Instead, the Act simply declares property to be held "in trust" and, at the same time, reserves *to the government* the "right" to use that property for "administrative or school purposes for as long as they are needed for that purpose." Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8. As the Court of Federal Claims stated, "the plain language of the [1960] Act reserves the Fort Apache site for the *federal government's* benefit and not for the benefit of the Tribe." Pet. App. 48a (emphasis added); see U.S. Br. 25.[1]

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[1] The government is still exercising its reserved right under the 1960 Act. Through the Bureau of Indian Affairs, the Department of the Interior (Department) operates the Theodore Roosevelt Indian School at Fort Apache. According to the Department, during the 2001-2002 school year, 113 students were enrolled at the school, 50 of whom lived in dormitories on the site. The total

The Tribe claims (at 3) that "[t]he trust property is a valuable economic asset for the Tribe," stating that "[t]he Tribe has plans to use the property * * * for tourism development, as Fort Apache has become an increasingly significant tourist attraction." In fact, the Tribe's damages claim in this case is based entirely on a 1998 report commissioned by the Tribe (and appended to the complaint), detailing the costs necessary to refurbish Fort Apache in accordance with the Secretary's Standards for the Treatment of Historic Properties and Guidelines for Preserving, Rehabilitating, Restoring, and Reconstructing Historic Buildings (codified in part at 36 C.F.R. Pt. 68).[2] But there is no evidence that Congress had tourism or any other economic development of the property in mind when it

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budget for the school for the 2000-2001 year, including program funds, operations and maintenance, and administrative costs, was approximately $2 million. In addition to those funds, the Department reports that from 1987 to 2001, it allocated more than $3.4 million for repair and renovation projects at the school.

[2] The Secretary's "standards for historic buildings" (Resp. Br. 4) apply only to "proposed grant-in-aid development projects assisted through the National Historic Preservation Fund." 36 C.F.R. 68.1. As the Tribe has acknowledged, such standards "are procedural in nature and do not affirmatively mandate preservation of historic buildings or other resources." Pet. App. 53a n.9. Moreover, although the Tribe argued below that its damages claim was authorized by federal historic-preservation laws, that argument was properly rejected by both courts, see *id.* at 8a-10a, 48a-49a, and in this Court the Tribe relies solely on the 1960 Act. The Tribe claims (at 4 n.8) that it "is seeking money damages to repair, not 'rebuild' Fort Apache," but the 1998 report on which it bases its damages claim refutes that contention. From recommending, *inter alia*, that the Fort's stables be "rebuilt" (Compl. App. A at 131-1) to proposing that the Bearded Irises along Officers' Row be "replaced" (*id.* at L-3), the 1998 report is a complete manual for the restoration of Fort Apache.



enacted the 1960 Act. To the contrary, the Act was passed to deal more formally with the title to Fort Apache in the wake of the military's departure from the post, and to afford the government "flexibility" to continue to use the property for its own purposes, just as it had before. S. Rep. No. 671, 86th Cong., 1st Sess. 4 (1959) (Resp. Lodging L-11); see U.S. Br. 27 n.11.[3]

2. According to the Tribe (at 44), the Act's conveyance of property "in 'trust' to the Tribe, includes by implication, a remedy for breach of trust." See Resp. Br. 10 ("The express trust created by Congress * * * necessarily includes an implied remedy for breach of trust."); *id.* at 36 (same). That is incorrect.

In *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), this Court rejected the argument, urged by the dissenting Justices in that case, that the statute at issue there—the General Allotment Act—could fairly be interpreted as mandating compensation because it "explicitly creates a 'trust.'" *Id.* at 547 (White, J., joined by Brennan and Stevens, JJ., dissenting); see U.S. Br. 23-24. The trust relationship created by the 1960 Act is even more limited than the one in *Mitchell I* and, thus, *a fortiori*, does not authorize damages for breach of trust. The General Allotment Act required the United States to hold the property in *Mitchell I* "in trust for the sole use and benefit of the Indian [allottees]." 445 U.S. at 541 (quoting 25 U.S.C. 348). Here, by contrast, although the 1960 Act declares that

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[3] Fort Apache was already well more than a half-century old in 1960. Yet far from indicating that Congress intended to assume liability for the sort of repair and restoration damages at issue, the House Report accompanying the 1960 Act states that the statute's "[e]nactment * * * will entail no expenditure by the Government." H.R. Rep. No. 1284, 86th Cong., 2d Sess. 2 (1960) (Resp. Lodging L-26).

the property is held "in trust," it is not held for the "sole and exclusive benefit of the Indian[s]." Rather, as even the Tribe acknowledges (at 38), "the Secretary unquestionably has a reserved right in the 1960 Act to use the * * * trust property" for *government* purposes. Accord Resp. Br. 34.

In *Mitchell II*, this Court reiterated that, although the General Allotment Act at issue in *Mitchell I* "provided that the United States would hold land 'in trust' for Indian allottees," that Act "create[d] only a limited trust relationship." 463 U.S. at 217. The Court further explained that "[t]he trust language of the [General Allotment] Act does not impose any fiduciary management duties or render the United States answerable for breach thereof." *Id.* at 217-218. So too here. Indeed, the Tribe acknowledges (at 11) that the 1960 Act is "silen[t]" not only with respect to any right to money damages or compensation, but also with respect to any underlying substantive "maintenance and protection duties" for the benefit of the Tribe. See U.S. Br. 26-27; Pet. App. 19a ("It is undisputed that the 1960 Act does not explicitly define the government's obligations."). The absence of any such express duties for the benefit of the Tribe is all the more telling in light of the fact that the 1960 Act explicitly reserves to the government the right to use the trust property for its own purposes for as long as it deems such use necessary.

In *Mitchell II*, which involved a set of statutes and regulations different than the General Allotment Act, the Court concluded that the United States could be held accountable in damages for the breaches of trust alleged in that case. In reaching that conclusion, however, the Court did not rely on the simple fact that the United States held property "in trust" for the Indian plaintiffs; rather, in finding a substantive right to



compensation, the Court emphasized that "the statutes and regulations at issue * * * *clearly establish* fiduciary obligations of the Government in the management and operation of Indian lands and resources," and that the provisions in turn could "fairly be interpreted as mandating compensation by the Federal Government for damages sustained." 463 U.S. at 226 (emphasis added); see U.S. Br. 19-20 & n.8, 26-28. The 1960 Act here, like the General Allotment Act in *Mitchell I*, does not even mention, much less "clearly establish," any fiduciary obligations that conceivably could in turn give rise to a right to compensation for a violation.[4]

3. In trying to make up for "[t]he 1960 Act's silence about money damages" (Resp. Br. 12), the Tribe argues that recognizing a "money damage remedy" in this case would be "consistent with this Court's 'well-settled' rule that 'where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available

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[4] This Court's refusal to give Congress's use of the words "in trust" the sort of talismanic significance urged by the Tribe is well-founded not only as a matter of the bedrock sovereign-immunity principles underlying the Tucker Act, but as a matter of trust law. For one thing, "[t]here are a number of widely varying relationships which more or less closely resemble trusts, but which are not trusts, although the term 'trust' is sometimes used loosely to cover such relationships." Restatement (Second) of Trusts § 4, Introductory Note at 15 (1959) (Restatement of Trusts). So too, even when a trust is created, any number of powers or duties can be reserved or modified with respect to the "administration of the trust." *Id.* § 37; see also *id.* § 176, comment d. Thus, even the Restatement, on which the Tribe relies, supports the conclusion that, in construing an Act of Congress that places property "in trust," a court should look to the specific obligations prescribed by Congress, rather than simply the general label used by Congress to characterize a relationship.

remedy to make good the wrong done.'" *Ibid.* (quoting *Barnes* v. *Gorman*, 122 S. Ct. 2097, 2102 (2002)). That rule, however, applies in the context of implied private rights of action against individuals, not to suits against the United States itself. Cf. *FDIC* v. *Meyer*, 510 U.S. 471, 481-484 (1994).

In *Testan*, this Court specifically rejected the argument that "where there has been a violation of a substantive right, the Tucker Act waives sovereign immunity as to all measures necessary to redress that violation." 424 U.S. at 400. As the Court explained: "In a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity, and we regard as unsound the argument * * * that all substantive rights of necessity create a waiver of sovereign immunity such that money damages are available to redress their violation." *Id.* at 400-401. Rather, "the asserted entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation'" for a violation. *Id.* at 400; accord *Mitchell II*, 463 U.S. at 216-217. Nothing in the 1960 Act supports such an interpretation.[5]

[5] The Tribe claims (at 11) that the government's interpretation of the 1960 Act "results in a patently absurd and unjust consequence." See Resp. Br. 26. That is incorrect. It simply results in the conclusion that the United States has not waived its sovereign immunity from suit for money damages in this context. See *United States* v. *Shaw*, 309 U.S. 495, 501 (1940) ("The reasons for this immunity are imbedded in our legal philosophy."). "Not every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act." *Mitchell II*, 463 U.S. at 216. In any event, as the Court of Federal Claims and Chief Judge Mayer explained, the remedy for alleged waste traditionally available to the holder of a contingent interest in property, such as the Tribe here, is an injunction, not damages. See Pet. App. 34a-36a, 53a-55a; note 8, *infra*. In *Mitchell II*, this Court concluded that the availability of "prospective equitable remedies" was "inadequate" because it believed that "the Indian allottees are in no position to monitor * * * their lands on a consistent basis." 463 U.S. at 227; see *ibid.* ("Many [allottees] are poorly educated, most are absentee owners, and many do not even know the exact physical location of their allotments."). The Tribe here, however, has for decades actively monitored the situation at Fort Apache. Resp. Br. 3.



### C. There Is No Basis To Imply A Right To Recover Damages From The United States That Is Not Specified By Congress

1. The Tribe argues broadly that the Indian Tucker Act (28 U.S.C. 1505) authorizes Indian plaintiffs to recover money damages as long as they are "based upon an alleged breach of a fiduciary obligation that arises under the Constitution, laws, treaties of the United States or Executive Orders of the President." Resp. Br. 16-17; see *id.* at 13-18. In particular, the Tribe rejects (at 17) the suggestion that "Indian Tucker Act claims [are] 'the same' as non-Indian Tucker Act claims." But in the *Mitchell* decisions, the Court made clear that the Indian Tucker Act entitles Indian plaintiffs to the *same* rights and remedies in suits against the United States as non-Indians, not the sort of special status that the Tribe seeks here. See *Mitchell I*, 445 U.S. at 539-540; *Mitchell II*, 463 U.S. at 212 n.8; U.S. Br. 40-41. As the Court explained, the Indian Tucker Act "no more confers a substantive right against the United States to recover money damages than does [the Tucker Act]." *Mitchell I*, 445 U.S. at 540.[6]

[6] The Tribe argues (at 13) that the statements of then-Representative Jackson, the sponsor of the bill that became the Indian Tucker Act, support the conclusion that "[w]hen Congress enacted the 1946 Indian Claims Commission Act, it expressly presumed and intended that future claims filed by Tribes under Section 24 would or could be based on the Government's trust mismanage-

In effect, the Tribe argues that, under the Indian Tucker Act, *any* law that might be said to create some form of trust relationship with an Indian Tribe authorizes the recovery of money damages against the United States for a breach of that relationship. As discussed above, however, that argument is directly contradicted by *Mitchell I*, in which the Court refused to conclude that the express trust relationship created by the General Allotment Act was itself sufficient to authorize the recovery of breach-of-trust damages under the Tucker Act or Indian Tucker Act. So too, in *Mitchell II*, the Court emphasized that "[n]ot every claim" for damages invoking an Act of Congress is cognizable under the Tucker Act or Indian Tucker Act. 463 U.S. at 216. Instead, "the claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Id.* at 216-217. That is just as true for the tribal plaintiff here as it was for the Indian plaintiffs in the *Mitchell* litigation.

Moreover, if adopted by this Court, the Tribe's far-reaching interpretation of the Indian Tucker Act would transform the Court of Claims into a court of equity for Indian plaintiffs, in which jurisdiction would invariably

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ment or breach of its fiduciary obligations to Indian Tribes." In *Mitchell I*, however, this Court rejected the same argument. See 445 U.S. at 540 n.2 ("Contrary to respondents' assertions, the comments of then-Representative Jackson * * * do *not* indicate that Congress intended [the Indian Tucker Act] to be a waiver of sovereign immunity for any alleged breach of trust accruing after August 13, 1946. Indeed, Representative Jackson stated that 'the bill provides that with respect to all grievances that may arise hereafter Indians shall be treated *on the same basis* as other citizens of the United States in suits before the Court of Claims.'") (quoting 92 Cong. Rec. 5313 (1946)) (emphasis added).



be present to adjudicate damages claims brought by "an Indian Tribe, band or group" for breach of any alleged fiduciary obligation that could be traced to the "Constitution, laws or treaties of the United States, or Executive orders of the President." 28 U.S.C. 1505. When Congress enacted the Indian Tucker Act, it directed the Indian Claims Commission to "'hear and determine' such claims against the United States based on legal and equitable principles and on considerations of 'fair and honorable dealings.'" *Mitchell I*, 445 U.S. at 540 n.2. But it did so only with respect to "claims arising *before* August 13, 1946." *Ibid.* (emphasis added). All claims arising after that date, including the claim here, must be adjudicated in accordance with established Tucker Act principles discussed above.

2. The Tribe argues (at 30, 31) that the existence of "control by the Government over Indian property" provides an "independent basis" for establishing a fiduciary duty that, if breached, would support a claim for damages. See Resp. Br. 9 ("[T]he existence *vel non* of an enforceable trust-fiduciary relationship is inferred by courts from the nature of the transaction or activity involved, that is, whether the Government in the case at hand has taken on, supervised managed *or* controlled Indian monies or properties."); *id.* at 10-11, 39-40, 42-44. That argument also fails. See U.S. Br. 29-33.

In *Mitchell II*, the Court did note that the government exercised "elaborate control over forests and property belonging to Indians." 463 U.S. at 225. But in that case, the applicable statutes and implementing regulations vested the Secretary with control over the property that was to be exercised *for the benefit of the Indians*. In this case, by contrast, the 1960 Act vests the Secretary with control of the property *for the benefit of the government*. See Pet. App. 14a-15a ("It is

undisputed that the 1960 Act contains no * * * requirement" for "the United States to manage the trust corpus for the benefit of the beneficiaries, *i.e.*, the Native Americans.").

Moreover, even in *Mitchell II*, the Court did not base its determination that damages were available on the sort of "control alone" test fashioned by the court of appeals, Pet. App. 15a, and advanced by the Tribe here. Rather, the Court looked to whether the statutory and regulatory provisions on which the Indian plaintiffs based their claims imposed specific duties, and whether those provisions could in turn "fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties *they* impose." 463 U.S. at 219 (emphasis added); see *id.* at 228. That is, the Court considered control not in a *factual* sense, but rather in the *legal* sense of specific "fiduciary management duties" (*id.* at 218) that were rooted in the express terms of the statutes and implementing regulations at issue. See *id.* at 224-225. It is "undisputed" (Pet. App. 19a) that the 1960 Act does not spell out any such duties. See also Resp. Br. 11 (acknowledging that the 1960 Act is "silen[t]" with respect to "maintenance and protection duties").

For these reasons, the bare trust created by the 1960 Act is far removed from the sort of "comprehensive" regulatory scheme at issue in *Mitchell II*, which—with marked specificity—"addressed virtually every aspect of forest management." 463 U.S. at 220, 222; see *id.* at 219-223. And, as discussed, whereas the statutes in *Mitchell II* explicitly obligated the government to manage Indian timber resources in light of "'the needs and *best interests of the Indian[s],*'" *id.* at 222 (quoting 25 U.S.C. 406(a)) (emphasis added), the 1960 Act imposes no such obligation and, indeed, expressly



authorizes the government to use the trust property for its own purposes.

3. The Tribe argues that a damages remedy may be supplied by "look[ing] to the common law of trusts, *as modified by* the statutory or other source of the substantive right giving rise to a Tribe's breach of trust claim." Resp. Br. 36 (emphasis added); see also *id.* at 12. That analysis would turn the established Tucker Act inquiry on its head. As this Court explained in *Mitchell II*, "for claims against the United States 'founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department,' a court must inquire whether *the source of substantive law* can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." 463 U.S. at 218 (emphasis added; citation omitted). Particularly where, as here, the "source of substantive law" does not impose any affirmative duties for the benefit of the Indians at all, much less create a right to money damages, there is no basis for a court to turn to unanchored, judge-made principles of common law to supply such a remedy. See U.S. Br. 33-35.[7]

The United States' power concerning Indians and Indian resources is fundamentally different in terms of its origin and nature than that of a simple common-law trustee, with respect to both the beneficiaries of the trust and the trust res. Accordingly, this Court has

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[7] In addition to raising serious separation of powers concerns (see U.S. Br. 42-43), subjecting the United States to damages based on reference to the common law "would 'rende[r] superfluous' 'many of the federal statutes * * * that expressly provide money damages as a remedy against the United States in carefully limited circumstances." *Sheehan*, 456 U.S. at 740.

recognized that the federal government performs a role in its relations with the Indian Tribes that is different from that of a simple private trustee governed by common law standards. See, *e.g.*, *Nevada* v. *United States*, 463 U.S. 110, 127-128 (1983). Moreover, the common law itself drew a distinction between private trustees and public trustees, particularly with respect to remedies. See 2 A. Scott, *The Law of Trusts* § 95, at 17 (4th ed. 1987) ("At common law it was held that a use or trust could not be enforced against the Crown."); Restatement of Trusts § 95. Particularly when it comes to duties that may be enforceable through a damages remedy, any attempt to redefine the federal trust relationship with respect to Indian Tribes or tribal resources must be accomplished through the legislative process, and not judicial imposition of duties drawn from the common law that were fashioned and have long been applied with an entirely different set of considerations in mind. "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001).[8]

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[8] That is especially true where, as here, it is, at the very least, debatable what rule the common law would supply in a case between private parties. The courts below split over whether even the common law would afford the Tribe a damages remedy for the alleged mismanagement in this case. Compare Pet. App. 26a-31a & n.15, with *id.* at 34a-36a, 52a-55a. Under the Restatement (First) of Property § 188 (1936) (Restatement of Property), the holder of a contingent interest in an estate occupied by another "cannot recover damages immediately payable to himself for any act or omission of the owner of the estate for life." As Chief Judge Mayer explained, the Tribe's interest in the property here is contingent, in that the 1960 Act authorizes the government to use the property "for as long as" it deems necessary, even in perpetuity. Pet. App. 35a. The United States' interest is therefore fundamentally different than a life estate, which is certain to end in a foreseeable period. At the same time, even assuming violation of some common law duty applicable to a private trustee, there would be no reason to allow the Tribe to recover damages today for the restoration of property that the government is entitled to use in perpetuity, and no basis to require the government to relinquish its right to use the property for its own purposes by allowing the Tribe to come on the property and restore it as *it* sees fit, *i.e.*, "for tourism development" (Resp. Br. 3), such as by rebuilding the cavalry's stables at the Old West Fort. Nor would there be any basis to infer a duty to maintain the property for any purposes other than the government purposes specified in the Act, particularly when the costs attendant to such an implied duty could greatly exceed the value of the property for the specified government purposes. Cf. Restatement of Property § 139.



The Tribe claims (at 10) that, because the 1960 Act "expressly created a 'trust,' [the Act] need not explicitly authorize a suit for damages for breach of trust any more than a contract between the United States and a private entity must explicitly authorize a suit for damages for breach of contract." See Resp. Br. 37 n.48. But quite unlike claims based on any alleged breach of trust, the Tucker Act explicitly consents to suit with respect to claims based on "any express or implied contract with the United States." 28 U.S.C. 1491(a)(1). Thus, unlike a plaintiff who sues the United States for breach of contract, a plaintiff who sues the United States for breach of trust must point to some source of positive law (an Act of Congress or implementing regulation) that itself creates not merely a specific substantive right, but a substantive right that "can fairly be interpreted as mandating compensation" if violated. *Mitchell II*, 463 U.S. at 216-217; see U.S. Br. 40 n.16.[9]

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[9] Both the Tribe (at 41-42) and amicus National Congress of American Indians (NCAI) (at 5, 15 n.7) rely on *United States* v.

Amicus NCAI argues that the 1960 Act should be interpreted "as including the *implied* duty 'to surrender the premises *at the expiration of [the] term* in as good a condition as when they were taken, ordinary wear and tear and damages from the elements excepted.'" NCAI Br. 16 (quoting *Dehn* v. *S. Brand Coal & Oil Co.*, 63 N.W.2d 6, 11 (Minn. 1954)) (emphasis added). As discussed above, there is no basis for grounding a damages claim brought under the Tucker Act on such an implied duty. But even if such an implied duty could provide the basis for a damages claim under the Tucker Act, it would not support the damages claim here. This action was brought *before* the government has even relinquished its right to use the property for its own purposes "for as long as" it deems necessary. See also note 8, *supra*.

4. Finally, the Tribe argues (at 28) that a damages remedy should be available in this case in light of the "general trust relationship between the United States and the Indian Tribes." See Resp. Br. 9, 17-18, 41; see also NCAI Br. 18-21. But the federal government's

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*Bostwick*, 94 U.S. 53 (1876), in arguing that the common law supplies a damages action against the United States for alleged waste. But *Bostwick* involved an action for breach of contract, not breach of trust. *Id.* at 65. Whatever authority *Bostwick* establishes with respect to the obligations that the United States assumes when it enters into a real estate lease, it does not support the claim for damages in this case based on the 1960 Act. Nor does it support the argument that this Court is free to read into that Act of Congress implied covenants or duties that are not found in or supported by the text of the Act. In any event, even if a breach-of-trust action were analogous to a breach-of-contract action under the Tucker Act, *Bostwick* would be distinguishable based on the express reservation in the 1960 Act of the government's "right" to use the property at issue for its own purposes "for as long as" it determines necessary.



special relationship with the Indian Tribes—which may in a general sense be described as one of guardianship or trust—does not automatically create legally enforceable duties on the part of the United States, much less a substantive right to recover damages against the United States for any alleged breach of such duties. See U.S. Br. 40-42. To the contrary, in determining whether the United States may be liable to an Indian plaintiff on a claim founded on an Act of Congress or implementing regulation, this Court applies the same principles under the Tucker Act governing whether the United States is liable for damages in other contexts. See *Mitchell II*, 463 U.S. at 218-219.[10]

Amicus NCAI traces the government's special relationship with the Indian Tribes through various decisions of this Court and back as far as the Northwest Ordinance of 1787. See NCAI Br. 19-21. But while there is no question that the United States has long enjoyed a unique relationship with the Indian Tribes, and that certain undertakings go along with that relationship, it is equally well-settled that the United States historically has enjoyed sovereign immunity from suit by an Indian Tribe for money damages for alleged breach of trust, except when Congress has waived such immunity. And "even for Indian plaintiffs, '[a] waiver of sovereign immunity "cannot be lightly im-

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[10] In *United States* v. *Cherokee Nation*, 480 U.S. 700, 707 (1987), this Court observed in a similar vein that, while "[i]t is, of course, well-established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity," that fiduciary relationship does not "create property rights where none would otherwise exist." So too here, the general relationship of guardianship or trust does not entitle an Indian Tribe to bring a damages action against the United States that is not otherwise actionable under the Tucker Act.

plied but must be unequivocally expressed."'" *United States* v. *Mottaz*, 476 U.S. 834, 851 (1986) (quoting *Mitchell I*, 445 U.S. at 538, and *United States* v. *King*, 395 U.S. 1, 4 (1969)). For most of the Nation's history, Congress passed "special jurisdictional Acts" waiving the United States' immunity from such claims. *Mitchell II*, 463 U.S. at 214. The Indian Tucker Act eliminates the need for such individualized jurisdictional acts. But to proceed under the Indian Tucker Act, an Indian plaintiff must still point to a source of positive law that imposes specific duties on the United States and provides for the payment of compensation by the United States if those duties are not performed. See *Mitchell II*, 463 U.S. at 216-217.

Because the 1960 Act does not impose any specific management duties on the federal government for the benefit of the Tribe, or confer a substantive right to recover money from the United States, this Court should reject the Tribe's and NCAI's invitation to create such a right simply "because it might be thought that [it] should be responsive to a particular conception of enlightened governmental policy." *Testan*, 424 U.S. at 400; see *Shaw*, 309 U.S. at 502 ("It is not our right to extend the waiver of sovereign immunity more broadly than has been directed by the Congress.").[11]

[11] For the reasons given in the government's opening brief, the decisions of this Court on which the Tribe and NCAI rely in pointing to the United States' general fiduciary relationship with respect to Indian Tribes or tribal property do not support implying a right to recover damages here. See U.S. Br. 35 & n.13 (discussing *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001); *Seminole Nation* v. *United States*, 316 U.S. 286 (1942); *United States* v. *Mason*, 412 U.S. 391 (1973)). In addition, the damages claim in *United States* v. *Cherokee Nation*, *supra*, was authorized by an Act of Congress that specifically "conferr[ed] jurisdiction on the United States District Court for the Eastern District of Oklahoma to determine 'any claim which the Cherokee Nation of Oklahoma may have against the United States for any and all damages to Cherokee tribal assets related to and arising from the construction of the [project at issue]." 480 U.S. at 702. And *Nevada* v. *United States*, 463 U.S. at 113, involved a water-rights action between the United States and a State.



### D. The Tribe Is Not Remediless For The Violation Of Any Substantive Duty That The Secretary May Have With Respect To The Trust Property

Here, as in other cases in which this Court has refused to find that the United States is accountable in money damages in the absence of the requisite statutory foundation, "the situation * * * is not that Congress has left the [plaintiff] remediless, * * * but that Congress has not made available * * * the remedy of money damages." *Testan*, 424 U.S. at 403.

The Tribe could have attempted in an appropriate court to obtain an injunction or other equitable relief for violation of any substantive duty that it believed was created by the 1960 Act (or by any other statute). See 28 U.S.C. 1331, 1361, 1362; 5 U.S.C. 701 *et seq.*[12] To be sure, in the government's view, such an action based on the 1960 Act would fail on the merits in light of the government's reserved "right" under the 1960 Act to use the property at issue "for as long as" it sees fit (as well as other defenses). But an action for equitable relief would not face the sovereign immunity bar that precludes the Tribe's damages claim in this case. See 5 U.S.C. 702 (authorizing certain actions against the

[12] The Court of Federal Claims concluded that it lacked jurisdiction to enter injunctive relief. Pet. App. 54a. The court of appeals did not address that ruling, and the Tribe has not sought review of it in this Court.

United States "seeking relief other than money damages").

In addition, to the extent that the federal government appropriates an Indian Tribe's property without just compensation, in violation of the Fifth Amendment, a Tribe may bring a claim for compensation under the Tucker Act. See, *e.g.*, *United States* v. *Creek Nation*, 295 U.S. 103 (1935); *Jacobs* v. *United States*, 290 U.S. 13 (1933).[13] But although it discusses the nature of its interest in the property at length, the Tribe has not brought a takings claim; rather, its only claim in this case is for breach of trust. Because the 1960 Act—the only source of substantive law on which the Tribe relies in this Court—does not mandate payment of compensation by the federal government for that alleged breach of trust, the Tribe's suit was properly dismissed by the Court of Federal Claims.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
*Solicitor General*

OCTOBER 2002

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[13] Both *Pueblo of Santa Ana* v. *United States*, 214 F.3d 1338, 1342 (Fed. Cir. 2000), and *United States* v. *Shoshone Tribe of Indians*, 304 U.S. 111, 112 (1938), on which the Tribe now relies (see Resp. Br. 25-26, 33), involved claims for just compensation under the Fifth Amendment for alleged appropriation of trust property by the United States. See also *id.* at 34 n.45 (citing Fifth Amendment cases).

No. 01-1067

Supreme Court, U.S.
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In The

# Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner,*

v.

WHITE MOUNTAIN APACHE TRIBE,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit**

## BRIEF AMICUS CURIAE OF THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF RESPONDENT

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## QUESTION PRESENTED

In 1960, Congress declared that a former military post in Arizona would "be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8. The question presented is whether that Act authorizes the award of money damages against the United States for alleged breach of trust in connection with such property.

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## INTEREST OF AMICUS CURIAE[1]

Amicus Curiae, the National Congress of American Indians (NCAI), is the oldest and largest national organization of tribal governments in the United States. Like the White Mountain Apache Tribe, NCAI's tribal members all have trust resources, resources over which they do not have sole ownership. As is the case here, their ownership is a beneficial ownership, which means that fee title is held by the United States in trust for the benefit of the tribes. Also, as is the case here, the United States often exercises extensive control over these trust resources.

While the narrow question presented in this case involves the interpretation of a unique statute passed for the benefit of the White Mountain Apache Tribe, several underlying issues in this case are of broad importance to NCAI members. The statute at issue here, the 1960 Act is being interpreted for the purpose of determining whether the White Mountain Apache Tribe may sue the United States for damages on a breach of trust claim. In this context, broader principles concerning the fundamental federal/tribal trust relationship and questions regarding when the United States may be held liable in damages for breaches of trust in the context of that relationship are

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[1] Counsel for Petitioner and Counsel for Respondent have consented to the filing of the brief of amicus. The consents are submitted for filing herewith.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than Amicus Curiae, their members or their counsel made a monetary contribution to the preparation and submission of this brief.

raised. NCAI's members all have substantial interest in these underlying issues and hence, have a substantial interest in this case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In 1960 Congress passed a unique act for the benefit of the White Mountain Apache Tribe ("Tribe"): the Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8. ("1960 Act"), which provides:

> All right, title, and interest of the United States in and to the lands, together with the improvements thereon, included in the former Fort Apache Military Reservation, created by Executive order of February 1, 1887, and subsequently set aside by the Act of January 24, 1923 (42 Stat. 1187), as a site for the Theodore Roosevelt School, located within the boundaries of the Fort Apache Indian Reservation, Arizona, are hereby declared to be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose.

Act of Mar. 18, 1960, P.L. 86-392, 74 Stat. 8.

The Tribe claimed that pursuant to this Act the United States used portions of the Tribe's trust property for the authorized purposes and in so doing exercised complete and exclusive control over that property. Recently, the United States completed its need for portions of the land and buildings and proposed to release its use



interest. The Tribe refused to accept the release without indemnification however, because the Tribe alleged, that while under its exclusive use and control, the United States, "destroyed, materially altered, caused to deteriorate, . . . unreasonably and improperly used, abused, neglected, mismanaged, and failed to act to protect" that property. Complaint at 6-7, para. 27. It further alleged that the United States, "committed waste by deliberately pulling down buildings, and removing things affixed to and constituting a material part of the trust corpus, and has failed to exercise even the ordinary care of a prudent person for the preservation and protection of the Tribe's trust corpus. . . . " *Id.* at 7, para. 28. Claiming that the United States breached its fiduciary duty to the Tribe by allowing or causing waste of the tribal trust property over which it had exclusive control, the Tribe sued in the United States Court of Federal Claims for money damages against the United States.

The Tribe invoked the jurisdiction of the Court of Claims under the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505.[2] As the Court has held, the Tucker Act waives the United States' sovereign immunity from suit whenever the "source of substantive law" upon which the claim is based, "can fairly be interpreted as mandating compensation by the Federal Government. . . . "

[2] The Indian Tucker Act, 28 U.S.C. § 1505, provides tribal claimants the same access to the Court of Claims that the Tucker Act provides to individual claimants. As any analysis regarding Tucker Act jurisdiction applies to Indian Tucker Act jurisdiction, *see United States v. Mitchell*, 445 U.S. 535, 539-40 (1980), any reference herein to Tucker Act jurisdiction is meant also to include and apply to Indian Tucker Act jurisdiction.

*United States v. Mitchell*, 463 U.S. 206, 216-217 (1983) (*Mitchell II*). No additional waiver of sovereign immunity need be found. *Id.* at 218-219.

Hence, if the positive law relied on here, the 1960 Act, can fairly be interpreted as mandating compensation by the Federal Government, it authorizes the Court of Claims to award damages for any proven breach of trust. As the Court held in *Mitchell II,* statutes and regulations are so fairly interpreted when:

> All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). [Referencing Restatement (Second) of the Law of Trusts § 2, Comment h, at 10 (1959).] '[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.' (quoting *Navajo Tribe of Indians v. United States*, 224 Ct.Cl. 171, 183, 624 F.2d 981, 987 (1980)).

*Mitchell II*, 463 U.S. at 225. Here, the language of the 1960 Act creates a trust, vests the Tribe with beneficial title in the trust property, makes the United States the trustee of that property, and authorizes the United States, the trustee, to exercise exclusive control over portions of the property (a right which it did in fact, exercise). Hence, here, like in *Mitchell II*, a fiduciary relationship arises under the 1960 Act.



Contrary to the United States' suggestion, the purpose of the United States' control here does not negate the fiduciary relationship and the duties that "naturally" arise therefrom. *Id.* at 226. Although the United States was authorized to use the Tribe's trust property to run an Indian school, and not to generate profit for the Tribe, the fact that the property was trust property and that the United States was the trustee of that property, did not change. The fiduciary duties naturally implied in the 1960 Act remained, as did the liability in damages for breach of those duties.

As part of its fiduciary responsibilities, the United States here is also liable to the Tribe for waste of the Tribe's property in its capacity as tenant – which, Amicus argues, describes the United States' use status here. *See, e.g., United States v. Bostwick*, 94 U.S. 53 (1876) (which held the United States impliedly liable for waste under a lease).

As in *Mitchell II*, the conclusion that the 1960 Act can fairly be interpreted as mandating compensation for the damages sought here is reinforced by the well-established, long-standing general trust relationship between the United States and Indian tribes. And, as in *Mitchell II*, the substantive source of law at issue here can easily be distinguished from the source of law which was at issue in *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*") – a source of law which could not be fairly interpreted as mandating compensation because it gave the United States no active role in managing or taking care of the property.

Amicus comes before this Court in support of the White Mountain Apache Tribe. It respectfully urges this

Court to affirm the Court of Appeals' holding that the 1960 Act is an act that can "fairly be interpreted as mandating compensation by the federal government" for the particular breaches of trust allegedly committed here, and to affirm the jurisdiction of the Court of Federal Claims to hear the Tribe's suit under the Tucker Act.

## ARGUMENT

### I. THE TUCKER ACT WAIVES THE UNITED STATES' IMMUNITY FROM SUIT FOR DAMAGES WHERE THE SUBSTANTIVE LAW UPON WHICH CLAIMANTS RELY "CAN FAIRLY BE INTERPRETED AS MANDATING COMPENSATION BY THE FEDERAL GOVERNMENT"

The question here is whether the Court of Federal Claims has authority to award damages in a suit brought by the White Mountain Apache Tribe ("Tribe") under the Tucker Act. The Tucker Act provides in relevant part: "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department . . . . " 25 U.S.C. § 1491(a)(1). For jurisdiction to lie, there must be a waiver of sovereign immunity. As the Court explicitly held in *United States v. Mitchell*, 463 U.S. 206, 215-16 (1983) (*Mitchell II*), if a claim falls within its terms, the Tucker Act provides a waiver of sovereign immunity.

> [T]here is simply no question that the Tucker Act provides the United States' consent to suit for claims founded upon statutes or regulations that create substantive rights to money damages. If a claim falls within this category, the existence of a waiver of sovereign immunity is clear.



*Mitchell II*, 463 U.S. at 218; *see also Id.* at 215-217. *See also Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 734 (1982) (recognizing that waiver of the United States' sovereign immunity to suit must be unequivocally expressed and holding that "the Tucker Act effects . . . such explicit waiver. . . . "). Because the Tucker Act waives the United States' sovereign immunity, determination of the lower court's jurisdiction here turns on the analytically distinct question: "whether the statutes or regulations at issue can be interpreted as requiring compensation." *Id.* Because this question is distinct from that of waiver of sovereign immunity, the rule requiring that waivers of sovereign immunity be strictly construed does not apply. The Court also made this clear:

> Because the Tucker Act supplies a waiver of immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity. 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'

*Id.* at 218-219. This holding in *Mitchell II* is crucial. However, its importance is ignored and even contradicted by the United States in its brief as it repeatedly tries to extend the notion of strict construction into this case. *See* U.S. Br. at 14, 17, 18 (*citing* numerous pre-*Mitchell II*, and non-Tucker Act cases). Amicus respectfully urges this Court to adhere to the precedent it established in *Mitchell II* and

reject the United States' invitations "to add to the rigor" of construction here "where consent has been announced."

## II. THE 1960 ACT CAN FAIRLY BE INTERPRETED AS MANDATING COMPENSATION BY THE FEDERAL GOVERNMENT FOR THE DAMAGES SUSTAINED IN THIS CASE

### A. The Language Of The 1960 Act Creates A Specific Trust And Establishes The United States' Exclusive Use And Control Of Portions Of The Tribe's Trust Property

As with all cases of statutory interpretation, the Court's task begins with the language of the Act. *See Williams v. Taylor*, 529 U.S. 420, 431 (2000). Here, the language is examined to determine whether the Act "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." As the Court has made clear, the language may do so either explicitly or implicitly. *Mitchell II*, 463 U.S. at 217, n.16 and 218. And, any ambiguity as to whether the language may be so fairly interpreted should be resolved in favor of the Tribe. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

The language, "held . . . in trust," places land in trust for the Tribe and creates a trust relationship between the United States and the Tribe. Indeed, the language of the 1960 Act creates a very specific trust: it clearly identifies a trustee ("the United States"), a beneficiary ("the White Mountain Apache Tribe") and a trust corpus ("the lands, together with the improvements thereon, included in the former Fort Apache Military Reservation. . . . ").



In addition to creating a specific trust, Congress, through the language "subject to the right of the Secretary of the Interior to use," authorized the United States to use and control portions of the trust property that it had just conveyed to the Tribe.[3] Although Congress granted the United States the right to use portions of the trust property, it did not eliminate the trust responsibility, remove or reserve any part of the property from trust status, nor did it relieve the United States of its status as trustee over that property.

The federal government suggests otherwise. In arguing that the language "carves out of the trust" the right of the federal government to use the property, the United States seems to suggest that either the property at issue is not trust property, or that it is no longer a trustee. *See* U.S. Br. at 11, 24-25. Nothing in the language supports such a reading. Indeed, the language compels the opposite conclusion. The language "*[a]ll* right, title, and interest" (emphasis added) indicates that Congress' intended to vest the Tribe with beneficial title to the *entirety* of the trust property.[4] Also, any suggestion that the United States is

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[3] Although Congress authorized use, this use interest was limited. First, the statute specifically uses the words of limitation "so long as" which temporally limits the United States' use, and second, the statute specifies that the property may be used only for two purposes– administrative or school purposes.

[4] That intent is supported by language in the legislative history of the 1960 Act. For instance, the Senate Report explicitly stated that the purpose of the bill which was to become the 1960 Act was, "to provide that the United States holds in trust approximately 7,579 acres of land, together with improvements thereon, for the White Mountain Apache Tribe of Arizona." S. Rep. No. 86-671 at 1 (1959) (7,579 acres of land and the improvements being the entirety of the conveyance). And, in

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not currently the trustee of the property is rebutted by Congress' explicit use of the present tense in the 1960 Act, "are hereby declared to be held." This language indicates that Congress intended to create the trust immediately, make the United States the trustee of all the land immediately, and vest the Tribe with beneficial title immediately. *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."). If there is any ambiguity as to any of these points, however, that ambiguity should be resolved in favor of the Tribe. *Montana v. Blackfeet*, 471 U.S. 759 (1985).

As the Court held in *Mitchell II*, federal control of tribal trust property is crucial in determining whether a source of law may be fairly interpreted as mandating compensation such that it gives rise to a cognizable claim for breach of trust. On this point, the Court held:

> [W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists

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described the value of the lands and improvements placed in trust for the Tribe, the record explicitly described the value of *all* the land and improvements. The record stated that the "lands to be donated, exclusive of improvements, are valued at $141,000. The improvements are located in the Theodore Roosevelt School area and consist of school building and plant valued at $495,980, roads and streets valued at $160,000 and irrigation laterals and ditches valued at $24,372. *Id.* at 2. The understanding was the same in the House of Representatives. In discussing the conveyance, Congressman Stewart L. Udall, "acknowledged that the department has agreed *the whole thing* would go back to trust status. . . . " Hearing on H.R. 8796 and S. 2268 Before the Subcommittee on Indian Affairs, Committee on Interior and Insular Affairs, 86th Cong. (Feb. 11, 1960) (Statement of Stewart L. Udall, Representative of the State of Arizona) (Emphasis added).



> with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

*Mitchell II*, 463 U.S. at 225. As in *Mitchell II*, the Tribe here alleges that the United States did exert control, indeed, exclusive control over portions of the Tribe's trust property pursuant to the terms of the 1960 Act. While the purpose of the United States' control of the trust property here differs from that in *Mitchell II*, the import of the exclusive control is no less important to the conclusion that the 1960 Act can fairly be interpreted as mandating compensation for the damages sought here.

In its brief, the United States argues that for federal control to play a part in determining whether the United States is subject to liability, such control must be specifically, "for the benefit of the Indians." See U.S. Br. at 31. In this way, the United States suggests that the purpose of control, rather than the extent of control is what governs. *Id.* at 7. From this premise, it tries to impress upon the Court that its use of the Tribe's trust property was not for the Tribe's benefit but for its "own benefit" or its "*own* purposes." U.S. Brief at 7, 22 (emphasis in original), 25. In addition to being disingenuous,[5] this assertion is irrelevant.

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[5] The United States has the right to use this property to operate an Indian school, for the benefit of Indians. As Stewart Udall recognized during hearings on the 1960 Act, "[t]he department approves the legislation and proposes merely that a proviso be put in that the

(Continued on following page)

It is true that the United States did not manage and control the property in question for "the purpose of protecting the Tribe's financial interest," U.S. brief at 7, or to manage the property solely for the benefit of the Tribe to generate proceeds and ensure profit for the Tribe. *Id.* at 27. However, the Tribe here is not suing to recover damages for mismanagement of this nature.[6] Rather, the Tribe here is suing to recover for the United States' outright neglect, waste and destruction of tribal trust property. *See* Complaint at para. 17. Hence, language requiring the United States to "manage the property for the benefit of the Indians" is neither necessary nor appropriate to create the duty to not waste the property.

### B. Duties Giving Rise To Damages Are Implied In The 1960 Act

As explained above, the 1960 Act creates a trust for the Tribe and grants the trustee, the United States,

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government right to continue to operate the school, *which of course, is for the benefit of the Indians. . . .* " Hearing on H.R. 8796 and S. 2268 Before the Subcommittee on Indian Affairs, Committee on Interior and Insular Affairs, 86th Cong. (Feb. 11, 1960) (Statement of Stewart L. Udall, Representative of the State of Arizona) (Emphasis added).

[6] In both *Mitchell I* and *Mitchell II*, the question presented to the Court was whether the United States was liable for the mismanagement of timber resources. The allegations in both *Mitchell I* and *Mitchell II* were that "the Government: (1) failed to obtain fair market value for timber sold; (2) failed to manage timber on a sustained-yield basis and to rehabilitate the land after logging; (3) failed to obtain payment for some merchantable timber; (4) failed to develop a proper system of roads and easements for timber operations and exacted improper charges from allottees for roads; (5) failed to pay interest on certain funds and paid insufficient interest on other funds; and (6) exacted excessive administrative charges from allottees." 445 U.S. at 537, 463 U.S. at 210.



limited rights to use the trust property. Under even the most rudimentary principles of the obligations of a trustee in using and controlling trust property, it can fairly be implied that the Secretary has a duty not to waste that property. For, that "would not be an exercise of guardianship, but an act of confiscation." *Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1937). As stated in the Restatement (Second) of Trusts § 176 (1959), "[t]he trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property." This duty includes protecting the property from loss, damage, or destruction. *See Id.* Comment (b); Bogert, Trusts and Trustees, § 582, at 346 (rev. 2d ed. 1980). And, under the law, breach of this trust duty gives rise to a claim for monetary damages. Scott, The Law of Trusts, § 176, at 482-489 (4th ed. 1987). *Mitchell II* plainly confirmed this when it held:

> Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust. . . . This Court and several other federal courts have consistently recognized the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of trust.

*Mitchell II*, 463 U.S. at 226. Given this clear precedent, the government's repeated suggestions that for a statute to be fairly interpreted as mandating compensation, it must be of a money character, is ill-founded. See U.S. Br. at 11, 16-17, 21.

Also ill-founded are the United States' assertions that the general law of trusts plays no role in informing the interpretation of the 1960 Act – an Act which clearly creates a trust and designates the United States the trustee. See U.S. Br. at 12. This Court has explicitly stated that "[i]t may be that where only a relationship between the government and the tribe is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects adequately describe the duty of the United States." *Nevada v. United States*, 463 U.S. 110, 127 (1983). *See also Mitchell II*, 463 U.S. at 226 & n.30; *United States v. Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (the federal government has "charged itself with moral obligations of the highest responsibility and trust ... [and] should therefore be judged by the most exacting fiduciary standard"); *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11 (2001) (recognizing that the Federal-Indian trust relationship "has been compared to one existing under a common law trust"). Also, in other contexts, when in interpreting the statutory phrase, "held in trust," the Court has held that "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *National Labor Relations Board v. Amex Coal Co.*, 453 U.S. 322, 330 (1981).



Similar duties, obligations, and liabilities not to permit or commit waste[6] can also be implied under the most basic tenets of American property law, tenets which are so basic that they must surely be implied to be part of the United States' duties as trustee of tribal trust property. Even if the United States is regarded here just in its capacity as tenant, there is an implied duty not to waste the Tribe's property.[7]

The "concept of waste ... is an old one: '[F]or he that suffereth a house to decay, which he ought to repaire, doth the waste. ... " Gregory M. Stein, The Scope of the Borrower's Liability in a Non-Recourse Real Estate Loan, 55 Wash. & Lee L. Rev 1207, 1284 n.146 (1988) (quoting Edward Coke, The Second Part of the Institutes of the Laws of England Chap. 24, 145 (Professional Books Ltd. 1986) (1817)). English common law defined waste as: "[a]ny act or omission which diminished the value of the estate or its income, or increased the burdens upon it or impaired the evidence of title thereto." *Hausmann v. Hausmann*, 596 N.E.2d 216, 219 (Ill.App. 1992). "More recently, '[w]aste occurs when someone who lawfully has possession of real estate destroys it, misuses it, alters it or neglects it so that

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[6] The new Restatement abandons the distinction between voluntary (intentional) and permissive (negligent) waste. See Restatement (Third) of Property: Mortgages § 4.6 & cmt. b (1997). *See City of New York v. United States*, 97 F. Supp. 808 (Ct. Cl. 1951) (U.S. responsible for damages caused by neglect of leased property).

[7] Amicus argues that the United States' use right is comparable to the use right of a tenant. A leaseholder or tenant is one who has a possessory estate, or a right to possession in the property, as the United States has here. Powell on Real Property §§ 16.02, 34.02 (1981). *See also* Restatement (Second) of Property § 1.2 (1977); Restatement of Property § 9 (1936).

the interest of persons having a subsequent right to possession is prejudiced in some way or there is a diminution in the value of the land being wasted.'" *Id.* *See also* Restatement (Second) of Property § 12.2 (1977).

Under these basic principles, the 1960 Act can be "fairly interpreted" as including the implied duty "to surrender the premises at the expiration of his term in as good a condition as when they were taken, ordinary wear and tear and damages from the elements excepted." *Dehn v. S. Brand Coal & Oil Co.*, 63 N.W.2d 6, 11 (Minn. 1954). Breach of this duty also gives rise to a claim for money damages. *See United States v. Bostwick*, 94 U.S. 53 (1876); Restatement (Second) of Property § 12.2.

This Court has confirmed that the doctrine of waste applies when the United States is a tenant and that when the United States does commit waste, it is implicitly liable in damages. *United States v. Bostwick*, 94 U.S. 53 (1876). In *Bostwick* a suit was brought against the United States for damages to property over which the United States had possession and control.[8] The United States had possession and control pursuant to a lease which provided only the term of the lease and the rent, "without restriction as to the use to which the property might be put." 94 U.S. at 65. Nothing in the lease explicitly imposed a duty on the

[8] The damages held to be waste in *Bostwick* are comparable to those alleged by the Tribe here. As correspondence from the property owner's trustee stated, "While the United States occupied the premises . . . the main house was burned; the flower-garden and shrubbery were destroyed; three and one-half miles of fence torn down . . . some sheds were torn down. . . . The part of the house not burned . . . was greatly damaged. . . . The premises were left in a dilapidated condition, and the house unfit for occupancy." *Bostwick*, 94 U.S. at 56.



United States not to commit waste during the tenancy. The Court found this language was implicit in the lease. The Court held that the United States was bound by certain implied duties, such as the obligation "to use the property as not unnecessarily to injure it . . . that the estate may revert to the lessor undeteriorated. . . . " *Id.* at 65-66. The Court held that this implied duty applied to the United States just as if it had been obligated by express language. *Id.* at 66. The Court continued, "[a]ll obligations which would be implied against citizens under the same circumstances will be implied against [the United States]." *Id.* The Court held that the United States was liable in damages for harm occurring while the United States was in possession, not "to make good any loss which necessarily results from the use of the property, but only such as results from the want of reasonable care in the use," hence binding the United States "not to commit waste." *Id.* at 68.

Here, the same duty not to commit waste and to return the property to the Tribe in the same condition as when taken, normal wear and tear excepted, is implied in the 1960 Act as much as if it had been expressly stated. Likewise, the implication that where the United States does commit waste, it is liable to the Tribe in damages, is as plain as if specific language stating that "the United States is liable in damages for waste committed" had been used. That is the teaching of *Bostwick*.

### C. The General Trust Relationship Reinforces The Conclusion That The 1960 Act Is Fairly Interpreted As Mandating Compensation For The Damages Here

The Court has explained that the existence of the general trust relationship is relevant in cases addressing

whether a statute can fairly be interpreted as mandating compensation for breach of trust in the Indian law context. As the Court indicated in *Mitchell II*, "[o]ur construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people." *Mitchell II*, 463 U.S. at 225. Likewise here, the trust relationship reinforces the interpretation of the 1960 Act as mandating compensation for the United States' destruction of property put in trust by that Act.

Where property is held in trust by the federal government for a tribe, the United States holds legal title and the Tribe holds equitable or beneficial title. *See United States v. Algoma Lumber Co.*, 305 U.S. 415, 421 (1939). This relationship traces back to the first contact between the Indian and European nations when it was recognized that even though fee title vested in the "discovering" nations and eventually, in the United States, Indians had the right of use and occupancy. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). This right of use and occupancy was as "sacred as that of the United States to the fee." *Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1937); *see also Mitchel v. United States*, 34 U.S. 711, 746 (1835). *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 48 (1831).

Only last term, this Court recognized:

> The existence of a trust obligation is not, of course, in question. . . . The fiduciary relationship has been described as 'one of the primary cornerstones of Indian law,' . . . and has been compared to one existing under a common law trust, with the United States as trustee, the Indian tribes or individuals as beneficiaries, and the property and natural resources managed by the United States as the trust corpus.



*Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11 (2001) (citations omitted). Also, the Court "has long recognized 'the distinctive obligation of trust incumbent by the government' in its dealings with Indian tribes, *see e.g., Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)." *Nevada v. United States*, 463 U.S. 110, 127 (1983).

Inherent in the trust relationship are concomitant trust duties – duties which trace to the first treaties and mutual promises made between the federal and tribal governments, when in exchange for vast relinquishments of land and promises of peace, the United States guaranteed that it would protect the ability of Indian tribes to continue their traditional way of life on remaining tribal homelands or reservations. *See* American Indian Policy Review Comm'n, 94th Cong., Final Report 126 (Comm. Print 1977) (finding that the federal trust responsibility emanates from "the unique relationship between the United States and Indians in which the federal government undertook the obligation to ensure the survival of Indian tribes"). *See also Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974) ("the federal Government took early steps to deal with the Indians through treaty, the principle purpose often being to recognize and guarantee the rights of Indians to specified areas of land").

In addition to its treaty foundations, the United States' trust duty also traces to judicial opinions of this Court and statutes of Congress. The Court first acknowledged the trust duty over 170 years ago in the Cherokee cases: *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). *Worcester* recognized "Indian nations as distinct political communities, having territorial boundaries, within

which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States."

In addition to the judicial recognition, there is also a long history of congressional recognition of the United States' trust duty. The most specific examples of early congressional recognition of the trust duty are found in the Trade and Intercourse Acts, see 25 U.S.C. § 177, which prohibited non-Indians from encroaching on Indian lands, regulated trade with the tribes, and prevented the alienation of Indian land – all purposes aimed at fulfilling its duty to protect the tribal land base. The Northwest Ordinance of 1787, also demonstrated Congress' early recognition of the federal duty of protection as part of the trust relationship:

> The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in justified and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

Northwest Ordinance of 1787, art. III, reprinted in 32 Journals of the Continental Congress 340-41 (Roscoe R. Hill ed., 1936) (reenacted by Act of Aug. 7, 1789, ch. 8, 1 Stat. 50). *See generally* Mary Christina Wood, Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources, 1995 Utah L. Rev. 109 (1995) and Mary Christina Wood, Indian Land and the Promise of Native Sovereignty: the



Trust Doctrine Revisited, 1994 Utah L. Rev. 1471 (1994) (providing a thorough discussion of the federal-Indian trust relationship and responsibility).

Trust duties "are not gratuitous obligations assumed on the part of the United States. They are obligations founded upon a consideration paid by the Indians by cession of part of their territory." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 58-59 (1831) (Thompson J., dissenting). As reiterated by President Nixon, the federal government has *not* "taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people" and it can*not* "discontinue this responsibility on a unilateral basis whenever it sees fit." President's Message to the Congress of the United States on the American Indians, July 8, 1970, at 2. As President Nixon recognized:

> [T]he unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has [made agreements]. . . . [T]he special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force.

*Id.*

### D. The 1960 Act Is Distinguishable From The General Allotment Act

The United States argues that the 1960 Act cannot be fairly interpreted as mandating compensation for the waste and destruction alleged here; that the substantive basis for suit here is even more limited than the basis relied upon in *United States v. Mitchell,* 445 U.S. 535 (1980) (*"Mitchell I"*). See U.S. Br. at 23-25.

In *Mitchell I* the Tribe claimed that the General Allotment Act, 25 U.S.C. § 331 et seq. ("GAA"), provided a substantive basis for suit for the alleged mismanagement of tribal trust timber resources. The Court disagreed, holding that, "[t]he Act does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." 445 U.S. at 542. Rather, the Court concluded that "the Act created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources." *Id.* In multiple important ways, the situation here is distinguishable from that in *Mitchell I*.

First, the trust created by the 1960 Act is a specific trust pertaining to a particular tribe about a particular and well defined piece of property. Unlike the GAA, the 1960 Act is not a general statute of general applicability.

Second, as noted above, supra, the Tribe here is not claiming that the United States mismanaged its trust property in the way that it was alleged to have mismanaged the property in *Mitchell I*. The question here is not whether the 1960 Act imposed on the Federal Government the duty to manage the property for the economic benefit of the Tribe. Rather, the question here is whether the Act



imposed on the Federal Government the duty not to waste the Tribe's property.

Third, unlike in *Mitchell I*, the 1960 Act created a trust that specifically authorized the United States' use of the Tribe's trust property. That crucial element of control was missing in the GAA. The Court in *Mitchell I* explicitly noted that the GAA did not "provide that the United States has undertaken full fiduciary responsibilities as to the management" of the trust property. *Mitchell I*, 445 U.S. at 542. The opposite was true. Under the GAA, "the Indian allottee and not a representative of the United States, is responsible for using the land for agricultural or grazing purposes. . . . Under this scheme, then, the allottee and not the United States, was to manage the land." *Mitchell I*, 445 U.S. at 542-543.

Finally, both the purposes and federal policies toward Indians underlying the 1960 Act and the GAA completely differed. As the Court emphasized in *Mitchell I*, the entire purpose of the GAA was to limit, even extinguish, the United States' management role with respect to the allotted properties. Congress "intended that the United States 'hold the land . . . in trust' not because it wished the Government to control use of the land and be subject to money damages for breaches of fiduciary duty, but simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from the state taxation." *Id.* at 544.

These goals reflected the larger goals and policies in existence when the GAA was passed. The GAA was passed

during one of the two periods in United States' relations with Indian tribes in which the federal government's recognition of its trust responsibility ebbed.[9] *See* Felix S. Cohen, Handbook of Federal Indian Law, 127-143 (1982 ed.) ("Cohen"). The GAA was rightfully interpreted by the Court to incorporate congressional intent at that time.

United States policy toward Indians and the trust responsibility had shifted by the time the 1960 Act was passed, however. In 1934 Congress passed the Indian Reorganization Act, 25 U.S.C. §§ 461-479 ("IRA") – an Act which was meant specifically to reverse the policy of allotment and the devastating effects of the GAA and reaffirm its trust duties toward tribes. *See* Cohen at 144-152. Indeed, as the provisions of the IRA itself demonstrate, see 25 U.S.C. §§ 461-465, when the 1960 Act was passed, Congress clearly intended to encourage and protect tribal trust property – an intent which should be read into the 1960 Act.

[9] The other period was the period known as the termination era, *see* Cohen at 152-180, which is not applicable here.



## CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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